NAVAL WAR COLLEGE

INTERNATIONAL LAW SITUATIONS

WITH

SOLUTIONS AND NOTES

1904

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PREFACE.

The discussion of International Law Situations was carried on by the considerable body of officers composing the conference of 1904, with the assistance of Mr. George Grafton Wilson, professor in Brown University.

It is always the intention to direct the discussions to those difficult and urgent situations in which naval officers have been, or are likely to be, involved, rather than to cases in which the law and precedent are well established, and the president of the college invites suggestions as to such cases.

C. S. SPERRY,
Captain, U. S. Navy, President.

U. S. NAVAL WAR COLLEGE,
Newport, R. I., March 3, 1905.

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INTERNATIONAL LAW SITUATIONS.

Situation I.

During a war between the United States and State X, a cruiser of the United States overtakes and visits a neutral merchant vessel bound, with no evidence of hostile intent and with innocent cargo, for an unblockaded port of State X.

The merchant vessel seems well adapted for conversion into an auxiliary cruiser. The officer of the United States cruiser mentions this fact to the captain of the merchant vessel. The captain points out that he is upon a regular voyage to a port of State X.

What action, if any, should the commander of the United States cruiser take?

SOLUTION.

From the statement of the situation there is no evidence that the vessel itself is engaged in unneutral service, is carrying contraband, or is about to attempt to run a blockade. Owing to the nature of its construction the vessel may easily be transformed into an enemy cruiser. Such a vessel is liable to seizure if destined to be sold or handed over to the enemy. The United States commander is therefore justified in making such inquiries as shall satisfy him that the vessel is bound upon an innocent voyage. If the evidence seems to show that the vessel is intended for sale to the enemy or for enemy service, the commander should send the vessel in for adjudication by the proper authorities.

NOTES ON SITUATION I.

General attitude toward neutral commerce.—It is evident from the statement of the conditions under which the merchant vessel was sailing that the vessel could not be seized on the ground of attempt to break a blockade,

and also that the vessel is not guilty of carrying contraband or at the time engaged in unneutral service. If no question is raised in regard to the construction of the vessel itself, the commander of the United States cruiser would without hesitation allow the neutral merchant vessel to proceed to her destination.

The merchant vessel, however, seems well adapted for conversion into an auxiliary vessel for war purposes. The officer of the United States is, therefore, obliged to consider whether on that account such a vessel should be detained when upon a regular voyage to a port of an enemy.

War upon the sea is becoming less and less an attempt to destroy innocent commerce. To capture all neutral vessels bound for enemy ports, provided they are so constructed that they might be converted into vessels which could be used for hostile purposes, would be an unduly severe blow to neutral commerce. The traditional policy and the recent practice of the United States would seem to discountenance such action. The general attitude of the United States has been to interfere as little as possible with the freedom of neutral trade. It would seem that a liberal position should be taken in regard to seizure of neutral vessels, even when such vessels may be converted into naval vessels.

Question of contraband.—On the other hand the value to the enemy of the vessels which are so constructed as to be easily adapted to serve for hostile purposes is very great. The classification of contraband of war, as set forth in declarations and other statements during the nineteenth century, does not cover the case of merchant vessels of the class under consideration except by a forced interpretation. The term "contraband of war" includes those articles only which have a belligerent destination and purpose. Such articles have been described as follows:

"1. Articles that are primarily and ordinarily used for military purposes in time of war, such as arms and munitions of war, military material, vessels of war, or instruments made for the immediate manufacture of munitions of war.

"2. Articles that may be and are used for purposes of war or peace, according to circumstances.

"Articles of the first class, destined for ports of the enemy or places occupied by his forces, are always contraband of war.

"Articles of the second class, when actually and especially destined for the military or naval forces of the enemy, are contraband of war."

This classification is in accord with the best opinion and regular practice. It would not be possible to claim that this merchant vessel, bound for a regular destination, falls under the designation of an article "primarily and ordinarily used for military purposes in time of war," unless further proof could be found than is evidenced in the situation as stated.

Vessels of the class under consideration are of comparatively recent development. They differ in status from other vessels on account of their adaptability to war purposes under certain circumstances. They also differ from the auxiliary or volunteer navy in that they have no direct relationship to the Government through contract or other agreement.

Contraband of war has been viewed in recent years as consisting almost solely of articles carried upon vessels. Grotius, in 1625, gives three general classes:

"1. Those things which have their sole use in war, such as arms.

"2. Those things which have no use in war, as articles of luxury.

"3. Those things which have use both in war and out of war, as money, provisions, ships, and those things pertaining to ships." (De Jure Belli et Pacis. Bk. III, ch. 1, 5.)

"Grotius regards articles of the first class as hostile, of the second as not a matter of complaint, and of the third as of ambiguous use (*usus ancipitis*), of which the treatment is to be determined by their relation to the war.

"While the general principle may be clear, the application of the principle is not simple. Those articles whose sole use is in war are without question contraband. Articles exclusively for peaceful use are not contraband. Between these two classes are many articles in regard to

which both practice and theory have varied most widely. The theorists have endeavored to give the neutral the largest possible liberty in commerce on the ground that those who were not parties to the war should not bear its burdens. This has been the opinion most approved by the jurists of Continental Europe. Great Britain and the United States have been inclined to extend the range of articles which might on occasion be classed as contraband." (International Law, Wilson and Tucker, p. 303.) Even the Supreme Court in the frequently cited case of the *Peterhoff*, says, "The classification of goods as contraband has much perplexed text writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable." (5 Wallace, 28.) It is evident from the study of the history of contraband that the classification of contraband changes as the methods and instruments of warfare vary. The main question is whether the article is or is not intended for military use. The term "contraband" is usually applied to cargo of ships and merchandise transported upon ships. There is no reason why the ship itself may not become itself merchandise when an object of sale for warlike purposes. That it may move under its own power makes no difference; it may become an object of trade, and as such its character may be determined by the use which it is to serve.

This merchant vessel is, as the officer of the United States cruiser points out, adapted for conversion into an auxiliary cruiser and is bound for an enemy port. The vessel is therefore capable of a double use, and may easily become a greater source of injury to the United States than many objects of conditional contraband.

There is no question that the vessel will come under the belligerent control on arrival at its destination. This being the case there can be no objection raised to the sale of the vessel itself or even to its seizure in an extreme case. It may not be the intent of the owner of the merchant vessel to sell it on arrival at its destination, but as Dana says of contraband, "The truth is, the intent of the owner is not the test. The right of the belligerent to prevent certain things getting into the mili-

tary use of the enemy is the foundation of the law of contraband, and its limits are, as in most other cases, the practical result of the conflict between this belligerent right on the one hand and the right of the neutral to trade with the enemy on the other." Dana also says, "I am inclined to the opinion that an actual intent to deliver articles capable of military use directly into military hands condemns the articles, at all events, as a voluntary intervention of their owner in the war; and that, whether there be or be not such an intent, the belligerent may capture certain articles because of their destination to a place where they will come under the enemy's control and so may be used by the enemy in direct military operations." Later, speaking of goods that are capable of a double use, Dana says, "Although nothing be developed as to the owner's intent, yet if the condition of the port of destination, or the character and state of the war, make it satisfactorily appear that they will, in all probability, go directly into military use, or directly tend to relieve an enemy from hostile pressure, the right of the belligerent to intercept them may be exercised solely for those reasons." (Dana's Wheaton's International Law, n. 226, pp. 633, 634; also Kleen, La Neutralité, I, sec. 92.)

Grounds for commander's judgment.—The intent of the owner may not be known to the captain of the merchant vessel, and in the case under consideration it is not such as to determine the action of the United States officer. His action must be determined by the nature of the thing itself, not by intent of the owner or person in control, for the intent is not capable of definition and determination. The intent of the owner or captain is a fact that, while significant, is not the final test. The nature of the vessel is, however, capable of determination. The simple fact is that the vessel which is adapted for conversion is bound for an enemy port. The vital question is, will this vessel, if permitted to continue her voyage without restraint, become an instrument of hostility against the United States? The nature of its construction makes this a possible or even a probable event, unless there be some guaranty to the contrary. It is

plainly the duty of the officer to consider what would be the condition with respect to the successful continuance of hostilities after this vessel has arrived within the enemy port. There is no doubt that there would be potentially an increase in the possible naval resources of the enemy, for this vessel may be purchased or seized even if necessary. This being the case, under present conditions it is the duty of the United States officer to guard against such increase. Such a vessel may be contraband even under the classification of contraband made so early as in the days of Grotius. (De Jure Belli et Pacis, Bk. III, ch. 1, 5.)

"The law as regards the sale of ships to belligerents is in a state of transition, and, as was to be expected, the most severe restrictions in this respect are placed upon British shipbuilders and owners. Recently the state of law was summed up as follows: 'An international usage prohibiting the construction and outfit of vessels of war is in course of growth, but it is not yet old enough, or quite wide enough, to have become compulsory on those nations which have not yet signified their voluntary adherence to it.' The difficulty with regard to ships not built primarily as men-of-war lies in the fact that few fast steamers are altogether unfitted to receive an armanent of some kind. The extremes of practice with regard to Russia and Japan are to be found in the action of Great Britain and Germany. This country, having men-of-war under construction for Japan, has publicly announced in her declaration of neutrality that no ships will be allowed to be delivered until after the war. Germany, on the other hand, has sold to Russia one of the large and fast mail steamers of the Hamburg-American line, a ship fitted by her construction to be used as an 'auxiliary' cruiser, as well as other ships of less importance." (L. G. Carr Laughton, "Belligerents and neutrals," The United States Service Magazine, June, 1904, p. 231.)

Such vessels are of a comparatively late form of construction. Consequently, their status has not been settled by many precedents.

From the nature of the construction the indications are that the vessel under consideration is fitted with a view to hostile use in case that it is advisable to so use the vessel. There is, therefore, evidence sufficient to warrant the commander of the cruiser in demanding further proof than the simple statement of the captain of the merchant vessel that he is upon his regular voyage. The burden of proof of innocent intent may properly be placed upon the merchant captain and should be thus placed in cases of this kind. This is not an undue hardship upon neutrals, as the vessel is of a character easily approximating contraband.

"As a general rule a neutral has a right to carry on such trade as he may choose with a belligerent. But the usages of war imply the assumption that the exercise of this right is subjected to the condition that the trade of the neutral shall not be such as to help the belligerent in prosecuting his own operations or in escaping from the effects of those of his enemy. When neutral commerce produces this result the belligerent who suffers from the trade is allowed to put it under such restraint as may be necessary to secure his freedom of action." (Hall, International Law, 5th ed., p. 505.)

The commander in protecting his country, if he has any ground for belief that sale might be made, could demand further evidence or even a guaranty that the vessel is not proceeding to the port of X for sale, or even might allow the vessel to proceed only on condition that it would not be sold to the enemy. This would not be an interruption of the peaceful commerce of the enemy, but only a proper measure to guard against the increase of the fighting power of the enemy. Should the captain of the merchant vessel be unwilling to give such guaranty as he is competent to give that the vessel will not be sold to the enemy at port X, this may be a ground for sending the vessel in for adjudication by a prize court.

It is certain that such vessels as are under hostile government contract or subsidy can not be allowed the same freedom as is allowed to ordinary commercial vessels.

It is also certain that there is a point at which the ordinary commercial vessel will merge into the vessel easily adapted for conversion into an auxiliary cruiser.

Some special considerations.—The commander of the visiting war vessel must decide on each case upon the evidence from all points of view, and in case of doubt it is safer to allow the courts to decide. He should take into consideration not only the construction of the vessel, but also such matters as the need of State X for such vessels, the practice of the State in regard to purchase and seizure of such vessels, the need for such vessels for warlike purposes in the port to which the vessel in question is sailing, the number of times this vessel has made this voyage to the port of X since the outbreak of hostilities, the responsibility and sincerity of the owners of the vessel, and the like.

In many instances it is wiser to incur the risk that the United States may have to pay indemnity for the delay of such a vessel rather than to incur the risk which would come from the addition of such a vessel to the navy of an enemy.

It is certain that such vessels will become a subject for consideration and that they can not be regarded as other than contraband in some instances. When so regarded, an officer would be justified by international law in seizing the vessel as itself contraband. Whether it will be the policy of the United States to place such vessel in its list of contraband, and what the decisions of courts will be in regard to goods, etc., upon such vessels, is not here considered.

Russian declaration, 1904.—The position of Russia makes such vessels contraband, as shown in the "Rules which the Imperial Government will apply during the war with Japan," 1904.

VI. Sont consideres comme contrebande de guerre les objets suivants: . . .

(6) Les bâtiments se rendant dans un port ennemi même sous pavillon de commerce neutre, si d'après leur construction, leur aménagement intérieur et d'autres indices, il y a évidence qu'ils sont construits dans un but de guerre et se dirigent vers un port ennemi pour y être vendus ou remis a l'ennemi.

This clause has been translated in the Official Notice of the British Board of Trade, March 18, 1904, as follows:

> The following articles are deemed to be contraband of war:
> (6) Vessels bound for an enemy's port, even if under a neutral commercial flag, if it is apparent from their construction, interior fittings, and other indications that they have been built for warlike purposes and are proceeding to an enemy's port in order to be sold or handed over to the enemy.

From the above it is evident that Russia would regard a vessel sailing, as is the vessel under consideration in the Situation, for its regular post of call, as free unless there is evidence that she is "proceeding to an enemy's port in order to be handed over to the enemy."

Doctor Lushington earlier took practically the same position in stating that British commanders are directed to detain as contraband a vessel "If she is fitted for purposes of war as well as commerce, and it appears that she is destined for the enemy's government to be used as a vessel of war." (Naval Prize Law, par. 207.)

Conclusion.—If this vessel is destined to be sold to the enemy for warlike purposes, it is plainly the duty of the commander to seize the vessel. There is evidence that it may easily be converted to such purpose. The commander should therefore take such measures as will give to him reasonable assurance that the vessel, though easily adaptable to warlike uses, will not come into the hands of the enemy for such uses.

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Situation II.

War exists between States X and Y. The United States is neutral. A port of State X is placed under martial law. Mr. B, a citizen of the United States, residing and doing business at the port, is seized, imprisoned, and about to be deported without trial. He appeals to the commander of a United States war vessel who chances to be the only representative of the United States in the region.

What action, if any, is the commander justified in taking?

SOLUTION.

The commander of the United States war vessel would be justified in requesting that Mr. B be not arbitrarily deported without trial, that he have a prompt and fair trial by a military court or commission, and if the military exigencies make a trial impracticable, he would be justified in requesting that Mr. B be placed in his custody.

NOTES ON SITUATION II.

Nature of martial law.—Silent leges inter arma is a common dictum of municipal law. This has been repeatedly recognized by the Government of the United States. The ordinary courts refuse to interfere with the course of military judgment as enforced by courts-martial. As affirmed by the Supreme Court in the case of *Dynes* v. *Hoover* (20 How., 65), "With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed which are not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them."

As Halleck says:

> It is necessary to distinguish between military and martial law; for the two are very different. In Great Britain the former has only to do with the land forces mentioned in section 2 of the Mutiny Act—now the Army Act, 1881—and the Articles of War. In the United States the Rules and Articles of

War constitute the Military law. This law exists equally in peace and in war, and is as fixed and definite in its provisions as the Admiralty, Ecclesiastical, or any other branch of law, and is equally with them a part of the general law of the land. But Martial law originates either in the prerogative of the Crown, as in Great Britain, or from the exigency of the occasion, as in other States; it is one of the rights of sovereignty, and is as essential to the existence of a State as is the right to declare or carry on war. It is a power inherent in every Government, and must be regarded and recognized by all other Governments. It is one of the incidents of war, invasion, or rebellion; and arises when there is no time for the slow and cumbrous proceedings of the Civil law. Like the power to take human life in battle, it results directly and immediately from the fact that war in name or in substance exists. (Halleck's International Law, Baker's ed., vol. 1, p. 544.)

Application to Mr. B.—Mr. B, in the case under consideration, is a citizen of the United States residing and doing business in the port of State X. This port is under martial law. He is not exempt by virtue of his United States citizenship from any of the legitimate consequences of war. The Instructions for the Government of Armies of the United States in the Field provide (Section 1, 7) that "martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that Government." These Instructions, which have been generally approved as liberal by other States of the world, also provide (Section 1, 5) that "martial law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed, even in the commander's own country, when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion."

These rules of war indicate the propriety of the suspension of the ordinary legal processes during the actual hostilities. This position has also been sustained by the Supreme Court of the United States.

"If in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is necessity to furnish a substitute for the civil authority,

thus overthrown, to preserve the safety of the army and of society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this Government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." (*Ex Parte Milligan* 4, Wallace 2. Mr. Justice Davis delivered the opinion.)

The fact that Mr. B, the citizen of the United States, was doing business in State X gave to him a more complete connection and interest in the affairs and destiny of State X than would the simple fact of temporary sojourn.

Risley (Law of War, p. 93) says:

> Where a person of whatever nationality, or his property, or a tract of territory, becomes connected with the enemy State in such a manner as to be a source, directly or indirectly, of strength and assistance to that State, such person, property, or territory must be regarded as being subject to or belonging to the enemy, and acquires an enemy character.
>
> Enemy character as attaching to persons and their property may arise from permanent allegiance to and residence within the territory of the adverse belligerent, in which case it is complete; or it may be of a partial and temporary nature, limited to certain intents and purposes, arising from such particular circumstances as having possessions in enemy territory, or maintaining a house of commerce there, from personal residence there, or from particular modes of traffic, such as sailing under the enemy's flag or passport.
>
> By this manner a belligerent's own subject or a neutral subject may acquire an enemy character depending upon a kind of implied temporary allegiance to the enemy State; but as soon as he chooses to terminate his hostile allegiance he terminates his hostile character.

As well stated by Davis (Elements of International Law, p. 333)—

> *Martial law*, or to speak more correctly *military rule*, or the *law of hostile occupation*, is a term applied to the government of an occupied territory by the commanding general of the invading force. Martial law also prevails in the immediate theater of operations of an army in the field. The reason in both cases is the same. The ordinary agencies of government, including the machinery provided for the prevention and punishment of crime, are suspended by the fact of war. This suspension takes place at a

time when society is violently disturbed, when the usual restraints of law are at a minimum of efficiency, and when the need of such restraint is the greatest possible. This state of affairs is the direct result of the invasion, or occupation, of the disturbed territory by an enemy. The only organized power capable of restoring and maintaining order is that of the invading force, which is vested in its commanding general.

Upon him, therefore, international law places the responsibility of preserving order, punishing crime, and protecting life and property within the limits of his command. His power in the premises is equal to his responsibility. In cases of extreme urgency, such as arise after a great battle, or the capture of a besieged place or a defended town, he may suspend all law and may punish crimes summarily, or by tribunals of his own constitution. . . . He appears in the occupied territory as an agent of his government, charged with the conduct of certain military operations. His first responsibility is to his own government for the successful conduct of the military operations with the direction of which he is charged. In carrying on those operations his government and himself are bound by the laws of war. The usages of war authorize him to employ certain forcible measures toward his enemy. They forbid indiscriminate violence, the use of excessive force, or the use of any force which does not contribute directly to the end for which the war is undertaken. His exercise of authority in the occupied territory must, therefore, be the least possible, consistent with these ends.

Position of Department of State.—During the revolution in Hawaii, in 1895, the following telegram was sent by Mr. Gresham, Secretary of State, to Mr. Willis:

DEPARTMENT OF STATE,
Washington, February 25, 1895.

With reference to your telegram of the 17th instant, touching the imprisonment or condemnation of numerous persons in connection with the recent disturbance in Hawaii, I observe your statement that 13 American citizens are still in prison without charges and without trial. This Government has no disposition to be exacting with that of Hawaii, especially under present circumstances, but it owes a duty to its citizens to see to it that they are not wantonly subjected to arbitrary treatment. Though martial law has been proclaimed, it does not follow that aliens innocent of participation in the acts which gave rise to its proclamation may be arrested and indefinitely imprisoned without charges and without trial. The existence of martial law, while it may imply the suspension of the methods and guaranties by which justice is ordinarily secured, does not imply a suspension of justice itself. You are instructed to insist to the Hawaiian Government that the American citizens still imprisoned without charge and without trial shall be promptly tried or promptly released.

GRESHAM.

The letter of Mr. Gresham to Mr. Willis of the same date with the above telegram, also defines the position of the United States in a special instance. It may be stated in

advance that the Mr. J. Cranstoun mentioned below was subsequently shown not to be an American citizen. The letter is as follows:

No. 66.] DEPARTMENT OF STATE,
Washington, February 25, 1895.

SIR: I have to acknowledge the receipt of your No. 86 of the 8th instant, in relation to affairs in Hawaii, and particularly in relation to the forcible deportation on the 2d instant of three men, one of whom, Mr. J. Cranstoun, claims to be a citizen of the United States.

I inclose herewith copies of certain depositions made by Mr. Cranstoun on the 11th and 12th instant, before Mr. Peterson, the commercial agent of the United States at Vancouver. These depositions leave the question of Mr. Cranstoun's nationality in doubt, and Mr. Peterson has been instructed to obtain further statements from him on that subject.

Under these circumstances, the Department does not now instruct you to make any representations to the Hawaiian Government in regard to Mr. Cranstoun, but it is proper to express to you, for your own guidance in similar cases, should they arise, the views here entertained in regard to the course of action taken in that case.

It appears that after having been kept in jail for nearly a month, without any charges having been made against him, he was taken under a heavy guard to a steamer and would, in spite of his request to you, have been deported without having had an opportunity then to do so had it not been for the accidental but timely interposition of the British commissioner.

You state that when you asked the attorney-general for an explanation of the proceeding he replied that the cabinet had determined to deport the men "in the exercise of the arbitrary power conferred by martial law." As this was the only explanation he gave, it is presumed it was all he had to offer, and he gave it without suggestion of any question as to Mr. Cranstoun's nationality.

If the position thus assumed be sound, the very proclamation of martial law in Hawaii renders all foreigners there residing, including Americans, liable to arrest and deportation without cause and without any reason other than the fact that the executive power wills it. They may be taken from their homes and their business; they may be deprived of their liberty and banished; they may be denied the ordinary as well as the special treaty rights of residence without offense or misconduct on their part, simply in the exercise of "arbitrary power."

To state such a proposition is, in the opinion of the President, to refute it. "Truly viewed," says an eminent author, "martial law can only change the administration of the laws, give them a rapid force, and make their penalties certain and effectual—not abrogate what was the justice of the community before The civil courts are in part or fully suspended, but, in reason, the new summary tribunals should govern themselves in their proceedings, as far as circumstances admit, by established principles of justice the same which had been recognized in the courts." (Bishop's Criminal Law, sec. 45.)

In view of what has been stated, your course in protesting against the position assumed by the attorney-general of Hawaii is approved.

I am, etc.,

W. Q. GRESHAM.

(U. S. Foreign Relations, 1895, p. 842.)

Position of the War Department.—A late opinion rendered to the War Department of the United States by Hon. Charles E. Magoon, law officer, Bureau of Insular Affairs (The Law of Civil Government Under Military Occupation, p. 12), says:

It will be seen that a military government takes the place of a suspended or destroyed *sovereignty*, while martial law or, more properly, martial rule, takes the place of certain governmental agencies which for the time being are unable to cope with existing conditions in a locality which remains subject to the sovereignty.

The occasion of military government is the expulsion of the sovereignty theretofore existing, which is usually accomplished by a successful military invasion.

The occasion of martial rule is simply public exigency, which may arise in time of war or peace.

A military government, since it takes the place of a deposed sovereignty of necessity continues until a permanent sovereignty is again established in the territory. Martial rule ceases when the district is sufficiently tranquil to permit the ordinary agencies of government to cope with existing conditions.

The power of such government, in time of war, is a large and extraordinary one, being subject only to such conditions and restrictions as the laws of war impose upon it.

As was said by the United States Supreme Court, such governing authority "may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases save those which are found in the laws and usages of war. . . . In such cases the laws of war take the place of the Constitution and laws of the United States as applied in the time of peace." (New Orleans *v.* Steamship Co., 20 Wall., 394.)

Commenting on this view of the law, the Texas supreme court say: "This language, strong as it may seem, asserts a rule of international law recognized as applicable during a state of war." (Daniel *v.* Hutcheson, 86 Texas, 61.)

Martial rule, as exercised in any country by the commander of an invading army, is an element of *jus belli*. It is incidental to a state of war and appertains to the law of nations. The commander of the occupying army rules the territory within his military jurisdiction as necessity demands and prudence dictates, restrained by international law and obligations, the usages and laws of war, and the orders of his superior officers of the government he serves and represents.

Conclusion.—It is evident that the commander in a region under martial law has a right to exercise such a measure of control of all inhabitants of the region, whether natives or foreigners, as military operations may require, and only that degree of force should be used which is necessary to accomplish the end of the war. This end can not be brought about more speedily by inflicting undue hardships on the innocent population; indeed, such action often prolongs hostilities.

In the case of Mr. B, the citizen of the United States, at a port of State X, which port is under martial law, it is proper, according to the position of the United States Government, that the ordinary processes of law should be hastened, because the existence of such a state of jurisdiction implies that ordinary court processes are not sufficiently effective to meet immediate exigencies.

Even though Mr. B is an alien in State X, the fact that he has been residing and doing business at the port renders him liable to the consequences of his sojourn in the time of war, provided the commander declaring martial law does not exceed his authority in the action toward Mr. B.

The seizure of Mr. B is an act which is within the field of proper authority of the commander enforcing martial law. The temporary imprisonment may be and often is necessary in the time of martial law. Imprisonment without trial, however, may be only for the period of absolute military necessity. Martial law does not imply the absence of justice in the treatment of the population which may be under it for the time being, but rather the acceleration of the course of justice. As deportation and imprisonment for a considerable time without trial would imply the absence or denial of proper procedure under generally recognized principles of international law, the commander of the United States war vessel would be justified in hearing the appeal of the citizen of the United States, Mr. B. He would be further justified in asking for Mr. B a fair trial by a military court or commission.

If the military exigencies make such a trial impracticable, the commander of the United States war vessel

would be justified in requesting that Mr. B be placed in his custody, in which case he would be under obligation to see that Mr. B conducts himself in a proper manner with regard to the authorities controlling the port.

Such action would accord with the general principles of justice and would be according to the instructions of the Department of State in the cases in Hawaii in 1895, when the Secretary said—

> You are instructed to insist to the Hawaiian Government that the American citizens still imprisoned without charges and without trial shall be promptly tried or promptly released.

The fundamental fact in all cases where martial law is declared is that it does not establish arbitrary authority without regard to law in the commander of the region, but accelerates the course of justice so far as the military necessities at the time demand.

Situation III.

There is an insurrection in State X, during which the following situations arise:

(*a*) Certain insurgent troops are pursued by the regular troops of State X. The insurgent troops seek and are granted asylum in the legation of the United States. The minister of the United States becomes alarmed and asks the commander of a United States war vessel in the harbor to receive the insurgents on board his vessel in order to prevent bloodshed, which is imminent.

What should the commander do, and why?

(*b*) The insurgents seize the *Robin*, a United States merchant vessel in the harbor, and, promising to recompense the owners, sail away with the vessel. The owners of the *Robin* request the commander of the United States war vessel to recover the *Robin* in case he meets the vessel. The commander meets the *Robin* on the high sea.

What, if anything, should the commander do?

(*c*) State X charters a United States merchant vessel to transport troops to the seat of the insurrection. When the vessel is about to land these troops it is captured by the insurgents. The captain of the United States merchant vessel appeals for assistance to the commander of a United States war vessel near by.

What action, if any, should he take?

Would he act otherwise if the troops of State X had been landed before the capture of the vessel?

(*d*) Mr. Smith, a citizen of the United States, is implicated in this insurrection in State X and is sent out of the country. Mr. Smith, as a passenger upon a vessel of State Y, subsequently enters a port of State X. He is thereupon arrested by the authorities of State X. He then appeals to the commander of a United States war vessel to obtain his release, stating that the action of the authorities of State X was illegal and unjustifiable.

What action, if any, should the commander take?

Situation III, (*a*).

There is an insurrection in State X, during which the following situation arises:

(*a*) Certain insurgent troops are pursued by the regular troops of State X. The insurgent troops seek and

are granted asylum in the legation of the United States. The minister of the United States becomes alarmed and asks the commander of a United States war vessel in the harbor to receive the insurgents on board his vessel to prevent bloodshed which is imminent.

What should the commander do, and why?

SOLUTION.

The commander should reply to the minister that he has no authority to promise to receive or directly or indirectly to invite any refugees on board his vessel, and that he can only judge in regard to the propriety of the reception of any such person or persons when they appear at the vessel requesting asylum.

NOTES ON SITUATION III, (*a*).

Reception to bodies of men.—This situation again raises the question of interpretation of article 308 of the United States Naval Regulations of 1900, which was somewhat fully discussed under Situation II in 1902. This regulation is as follows:

> The right of asylum for political refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum; but even in the waters of such countries officers should refuse all applications for asylum, except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum.

In Situation II, of 1902, the question of the propriety of a promise of asylum in advance of the emergency was discussed and the propriety of such promise was denied.

The case now under consideration finds certain insurgent troops already granted refuge in the legation of the United States.

Cases of asylum.—The minister of the United States may claim some weight of precedent for his request in the case of the reception of various members of the defeated faction after the battle of Placillas, in Chile, in 1891. The telegram from the United States legation on September 7, 1891, states that a number of the supporters of the Government of Chile, "in order to save

their lives, which certainly would have been sacrificed, took refuge on board the German and United States ships of war." (U. S. Foreign Relations, 1891, p. 161.) Later refugees from the legation of the United States, and from the Spanish legation, were received on board a United States war ship, and were accompanied to the ship by ministers of the United States, Spain, and Italy.

Brazil, 1894.—In 1894, on the suppression of the Brazilian insurrection, the leaders and some of the other insurgents were received on board a Portuguese man-of-war. Mr. Gresham, at that time Secretary of State, sent the following dispatch to Mr. Bayard:

No. 342.] DEPARTMENT OF STATE,
Washington, April 6, 1894.

SIR: You are doubtless aware that the night before the final collapse of the insurgent movement in the bay of Rio de Janeiro, da Gama, the insurgent leader, and some of his subordinate officials, were received on board a Portuguese man-of-war in the harbor. About two weeks ago the British ambassador here informed me that the Brazilian Government had demanded of Portugal the surrender of these men, and that the latter Government had offered to land them somewhere beyond the jurisdiction of Brazil, and there detain them until the fate of the insurrection should be known, when their right of asylum under the circumstances could be determined. Sir Julian was instructed, he said, by his Government to ask the United States to join Great Britain in a friendly suggestion to the Government of Brazil that it accept this offer of Portugal. I submitted the matter to the President and, after full consideration, he instructed me to inform Sir Julian that the United States did not feel inclined to join in the suggestion. A day or two later a substantially similar request was received from the Government of Italy, through Mr. Thompson, our minister at Rio, and answered in the same way, and within the last week a direct request to the same effect from the Portuguese Government, through its minister here, has been declined.

I am, etc., W. Q. GRESHAM.

(U. S. Foreign Relations, 1894, p. 278.)

Korea, 1895.—In Korea, in 1895, certain refugees sought the legation of the United States, and were received within it. At that time the United States representative at Seoul sent the following telegram to the Department of State:

SEOUL, *December 1, 1895.*

OLNEY, *Washington:*

Three days ago loyalists made a fruitless attempt to capture royal palace, in consequence of which usurpers are very bold, arresting and killing loyalists. I have 8 refugees. See my dispatch No. 159. No

charge made against them, but if caught they will be tortured and killed by the King's father. A demand may soon be made for them for some reason or other. It is desirable for them to leave. *Yorktown* will shortly leave for Shanghai. Will you authorize commander in chief to grant them passage?

SILL.

Mr. Sill subsequently explained that his intention was to prevent injury to the refugees. He says in a dispatch of January 20, 1896:

I had at no time supposed that the refugees could be sheltered by me "against officers of the *de facto* Government charged with apprehending them as violators of the laws of their country." On the contrary, they had been informed by me that I must at any time give them up upon proper demand from the Korean Government; hence my desire to get them out of the way before any demand for them should be served on me.

To the telegram mentioned above, Mr. Olney made a very positive reply, as follows:

DEPARTMENT OF STATE,
Washington, December 2, 1895.

SILL, *Minister, Seoul:*

Refugees can not be sheltered by you against officers of *de facto* government charged with apprehending them as violators of the laws of their country. Use of *Yorktown* in manner suggested is wholly inadmissible. The Department sees with disfavor your disposition to forget that you are not to interfere with local concerns and politics of Korea, but are to limit yourself strictly to the care of American interests.

OLNEY.

(U. S. Foreign Relations, 1895, pp. 974, 977.)

Development of policy in regard to asylum.—The general attitude toward asylum in legations and upon vessels of war has in recent years become less and less favorable. In some of the early diplomatic correspondence of the United States asylum was regarded with favor. In 1844 Mr. Calhoun wrote to the representative in Brazil that, "The right of asylum in revolutionary times and in revolutionary countries should be indulgently construed." During the latter half of the nineteenth century the policy of the United States has been to discourage the granting of asylum. In countries outside of those in the Western Hemisphere the granting of asylum has been reduced to the narrowest limits and almost prohibited. In Central and South American States, and in the West Indies, there have been, however, frequent instances of the exercise of this means of protec-

tion to refugees. Even in these countries the United States has tried to discourage the practice in late years. This is shown in a dispatch of Mr. Seward to Mr. Hollister, May 28, 1868, in which Mr. Seward says:

> The revolutionary condition seemed to have become chronic in many of the South American nations after they had achieved their independence, and the United States, as well as the European nations, recognized and maintained the right of asylum in their intercourse with those republics. We have, however, constantly employed our influence for several years to meliorate and improve the political situation in these republics, with an earnest desire to relinquish the right of asylum there.

Secretary Fish, in a dispatch to Mr. Bassett June 4, 1875, speaking of persons who have sought asylum in the United States legation in Port au Prince in the time of civil disturbances, says:

> It is regretted that you deemed yourself justified by an impulse of humanity to grant such an asylum. You have repeatedly been instructed that such a practice has no basis in public law, and so far as this Government is concerned, is believed to be contrary to all sound policy. The course of the diplomatic representatives of other countries in receiving political refugees upon such occasions is not deemed sufficient to warrant this Government in sanctioning a similar step on the part of the representatives of the United States.

Later, in 1883, Mr. Frelinghuysen says of this same correspondence:

> The views of this Government as to the right of asylum have long been well known. You will find them in the correspondence of this Department with your predecessor, Mr. Bassett. * * * While indisposed from obvious motives of common humanity to direct its agents to deny temporary shelter to any unfortunates threatened with mob violence, it is proper to instruct them that it will not countenance them in any attempt to knowingly harbor offenders against the laws from the pursuit of the legitimate agents of justice.
>
> (For many references, see 1 Wharton's Digest, sec. 104.)

Mr. Olney, in 1895, says that it is "the uniform rule of this Government to discountenance asylum in every form, and to enjoin upon its agents the exercise of the utmost care to avoid any imputation of abuse in granting such shelter. It may be tolerated as an act of humanity when the hospitality afforded does not go beyond sheltering the individual from lawlessness. It may not be tolerated should it be sought to remove a subject

beyond the reach of the law to the disparagement of the sovereign authority of the State." (Foreign Relations, 1895, p. 246.)

Mr. Hay, in 1899, says, "It is evident that a general rule, in the abstract, can not be laid down for the inflexible guidance of the diplomatic representatives of this Government in according shelter to those requesting it. But certain limitations to such grant are recognized. It should not, in any case, take the form of a direct or indirect intervention in the internecine conflicts of a foreign country, with a view to the assistance of any of the contending factions, whether acting as insurgents or as representing the titular government." (Foreign Relations, 1899, p. 258.)

From the instances cited above, and from many other instances where the opinion of the Government of the United States has been expressed, it is evident that the attitude of the United States is to discourage the grant of asylum to the utmost, and to limit its grant to cases where mob violence is threatened, or where the ordinary course of government is interrupted. This same tendency of restriction is evident in other countries as well as in the United States.

Attitude toward insurgent troops.—In the case under consideration the insurgent troops have sought the shelter of the legation to escape the consequences of war, which as troops they had waged upon the regular government. In sheltering these troops from the regular troops the minister of the United States has in a measure taken the part of the insurgents against the established government. Such action has repeatedly been disavowed by the United States Government. If these insurgent troops have engaged in hostilities against the established government they are liable to the consequences of their action, and it is not the function of representatives of the United States to protect them from such consequences. As Mr. Fish said, in 1875:

> Among other objections to granting such asylum it may be remarked that that act obviously tends so far to incite conspiracies against governments, that if persons charged with offenses can be sure of being screened

in a foreign legation from arrest they will be much more apt to attempt the overthrow of authority than if such a place of refuge were not open to them.

The printed Instructions to the Diplomatic Officers of the United States, issued by the Department of State declare that—

The privilege of immunity from local jurisdiction does not embrace the right of asylum for persons outside of a representative's diplomatic or personal household.

In some countries, where frequent insurrections occur and consequent instability of government exists, the practice of extraterritorial asylum has become so firmly etsablished that it is often invoked by unsuccessful insurgents and is practically recognizd by the local government, to the extent even of respecting a consulate in which such fugitives may take refuge. This Government does not sanction the usage and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise. While indisposed to direct its representatives to deny temporary shelter to any person who may be threatened by mob violence, it deems it proper to instruct them that it will not countenance them in any attempt knowingly to harbor offenders against the laws from the pursuit of the legitimate agents of justice.

Asylum to officers of established government.—In 1894 certain refugees were received upon the *Bennington* while that vessel of the United States Navy was at La Libertad in Salvador. These refugees were officers of the established government which the United States had recognized and when received were fleeing from the revolutionists. Of this event President Cleveland, in his message of December 3, 1894, says:

The Government of Salvador having been overthrown by an abrupt popular outbreak, certain of its military and civil officers, while hotly pursued by infuriated insurgents, sought refuge on board the United States warship *Bennington*, then lying in a Salvadorean port. Although the practice of asylum is not favored by this Government, yet in view of the imminent peril which threatened the fugitives, and solely from considerations of humanity, they were afforded shelter by our naval commander, and when afterwards demanded under our treaty of extradition with Salvador for trial on charges of murder, arson, and robbery, I directed that such of them as had not voluntarily left the ship be conveyed to one of our nearest ports where a hearing could be had before a judicial officer in compliance with the terms of the treaty.

From this passage of the President's message, and from the correspondence bearing upon the event, it is evident

that the affair was regarded as one of granting temporary shelter to those who were pursued by an irresponsible body of troops. In other cases the United States has made a distinction between the granting of temporary shelter to those in imminent danger and the granting of asylum as a deliberate act. While the first is sometimes allowable, the latter has been uniformly discountenanced. It has also been admitted in practice that somewhat more of favor may properly be extended to officials of the established government than to parties in opposition to it.

General consideration of the Situation.—In the case as presented for solution, the troops opposing the established government have received asylum in the United States legation, and from fear lest there may be bloodshed the minister of the United States requests the United States commander to receive the refugees on board his vessel. Presuming that there would be no difficulty in bringing the refugees to the vessel, which would doubtless be contrary to the fact, should he agree to receive the refugees? Of course, the commander would have no right to take any steps to bring the insurgent troops on board his ship or to secure their safety within the jurisdiction of State X while they are passing from the legation to the vessel, even if he should grant the requested asylum. The commander could, however, land forces for the protection of American interests. If the legation of the United States is in danger, the landing of forces for its protection is legitimate and such action is not uncommon. No violation of the territory of State X by landing a guard to escort the troops of the insurgent party could be held to be a protection of United States interests without the special orders of the Government.

The commander would be justified in affording protection to the legation in case of danger to it or offense against its inviolability.

The commander would not assume to judge of the propriety or impropriety of the action of the United States minister. Nor should he share the responsibility of the minister. The fact that the minister has received these

refugees does not justify the commander in receiving them even upon the minister's request. The position of the Government has been set forth by Secretary Hay, in 1899, when speaking of shelter, "certain limitations to such grant are recognized. It should not, in any case, take the form of a direct or indirect intervention in the internecine conflicts of a foreign country, with a view to the assistance of any of the contending factions, whether acting as insurgents or as representing the titular government."

Conclusion.—Considering the attitude of the Government, the policy toward the limitation of asylum, the fact that the minister may call upon the commander to protect the inviolability of the legation, the commander should reply that he has no authority to promise to receive any persons as refugees, and that the Regulations of the service state that even in the waters of countries where frequent insurrections occur, "officers should refuse all applications for asylum except when required by the interests of humantiy in extreme and exceptional cases, such as the pursuit of a refugee by a mob." Under these circumstances, when the pursuit is by the regular troops, the commander would not feel justified in interfering. Should these persons, however, appear at the side of his vessel seeking shelter under exceptional circumstances, he would be forced to decide at the time upon the propriety of receiving them.

Situation III, (*b*).

There is an insurrection in State X.

(*b*) The insurgents seize the *Robin*, a United States merchant vessel in the harbor, and promising to recompense the owners sail away with the vessel. The owners request the commander of the United States war vessel to recover the *Robin* in case he meets the vessel. The commander meets the *Robin* on the high sea.

What, if anything, should the commander do?

SOLUTION.

The commander of the United States war vessel is justified in using such force as is necessary to recover the vessel which has been seized by the insurgents.

NOTES ON SITUATION III, (*b*).

Insurgents as pirates.—It has been maintained often that insurgents committing an act similar to the one above mentioned are to be treated as pirates.

The statement of the Situation, however, admits the existence of an insurrection which is regarded as "a form of struggle, varying according to circumstances, but usually an armed struggle between two organized groups or parties within a state for public political ends." (Insurgency, Lectures Naval War College, 1900, p. 3.)

In many cases also the parent state may declare the insurgents to be pirates. This matter was very fully considered by the United States, in 1885, in consequence of the insurrection in Colombia at that time, when the President of the United States of Colombia declared certain vessels "occupied by the rebels to be pirates" and to be "beyond the pale of international law."

In discussing the treatment of these vessels, Mr. Wharton, solicitor for the Department of State, gave an opinion which, since 1885, has been several times affirmed, as follows:

> The Government of the United States can not regard as piratical vessels manned by parties in arms against the Government of the United States of Colombia, when such vessels are passing to and from ports held by insurgents, or even when attacking ports in the possession of the National Government. In the late civil war the United States, at an early period of the struggle, surrendered the position that those manning the Confederate cruisers were pirates under international law. The United States of Colombia can not, sooner or later, do otherwise than accept the same view. But, however this may be, no neutral power can acquiesce in the position now taken by the Colombian Government. Whatever may be the demerits of the vessels in the power of the insurgents, or whatever may be the status of those manning them under the municipal law of Colombia, if they be brought by the act of the National Government within the operation of that law, there can be no question that such vessels, when engaged as above stated, are not, by law of nations, *pirates;* nor can they be regarded as pirates by the United States. (U. S. Foreign Relations, 1885, p. 212.)

It is not denied, of course, that a local government may define what actions and what persons it will regard as piratical, but such local definition has significance only for the state making the definition. Indeed the United States Constitution specifically gives to Congress the

right "to define and punish piracies and felonies committed on the high seas and offences against the laws of nations." The definition of piracy in the international sense is, however, not dependent on these municipal provisions.

Policy of the United States.—As President Cleveland said, in his Message of December 8, 1885: "A question of much importance was presented by decrees of the Colombian Government, proclaiming the closure of certain ports then in the hands of insurgents, and declaring vessels held by the revolutionists to be piratical and liable to capture by any power. To neither of these propositions could the United States assent. An effective closure of ports not in the possession of the government, but held by hostile partisans, could not be recognized; neither could the vessels of insurgents against the legitimate sovereignty be deemed *hostes humani generis* within the precepts of international law, whatever might be the definition and penalty of their acts under the municipal law of the state against whose authority they were in revolt. The denial by this Government of the Colombian propositions did not, however, imply the admission of a belligerent status on the part of the insurgents."

The declaration by a state that a certain vessel or certain vessels are piratical does not make them such according to international law, nor does it give a foreign state a right to treat them as piratical. Mr. Bayard gave the opinion of the State Department, in 1885:

> The principle upon which I based my note of April 24 was, generally, that there can not be *paper piracy* with international effects and obligations any more than there can be a *paper blockade* of effective character. In the one case, as in the other, no force or effect can be communicated by a municipal decree which is not inherent in the case itself, and I felt constrained to announce to you that this Government could not deem itself bound in any manner by such a decree, either as entailing any international obligation or as conferring upon it any derived jurisdiction in the premises. The position seemed so self-evident and is so abundantly supported by authority that I deemed it quite unnecessary to enter into argument or collation of precedents to sustain the simple announcement.
>
> It would seem, however, that you have misunderstood that announcement, and you now seek to controvert on the assumption that it recognizes the vessels mentioned in the Colombian decree as legitimate belligerents, thereby divesting them of whatever inherent piratical character they may

possess. Your argument, and the precedent of the Magellan pirates adduced by you, aim to show that vessels of this character, even though ostensibly in the service of a hostile insurrection, may be tainted with piracy to a degree to bring them within the jurisdiction of a foreign state whose forces may have captured them on the high seas.

This position I am not disposed to deny, but I then did feel bound to deny, and do so still, that a municipal decree of a sovereign can communicate to a single vessel, or in comprehensive terms to a class of vessels, a character of piracy which they may not already possess under the circumstances surrounding each particular vessel, or that a foreign sovereign can derive or exercise any power, obligation, or jurisdiction in virtue of such a municipal decree which it does not already possess in the nature of the case under the law of nations. Were any foreign government to exercise such right or jurisdiction in the case of a vessel found committing acts in themselves piratical, a decree of this character could only, by the widest stretch, be deemed an acquiescence in and voluntary confirmation of the power and right so exercised by the law of nations. It could not be held to confer the right to capture and judge an actual pirate any more than, assuming the contrary position by way of hypothesis, it could deny or assume to annul that right in a given case. (U. S. Foreign Relations, 1885, p. 273.)

The declaration by a foreign state that certain vessels in revolt against the established government are piratical is often practically an admission of their insurgency and of the fact that hostilities exist with the faction in control of the ships, for piracy in the international law sense is determined by the intent of the act and not by domestic decree.

Attitude of Great Britain.—The *Huascar*, a Peruvian ship of war, was seized by its crew in a revolt in 1877. The Government of Peru declined to be responsible for the acts of the rebels. The *Huascar* boarded British vessels, seized coal, and took off passengers. "On the question being brought before the House of Commons, the attorney-general expressed his opinion that the *Huascar* was not a belligerent, but a rover committing depredations which made her an enemy of her Britannic Majesty, and therefore it could not be disputed that the admiral could wage war upon her. If she were a belligerent, or the vessel of a belligerent power, to which the representation of the British Government was under an obligation to extend belligerent rights, the proceedings of the admiral might be open to censure. But to make out that she was a vessel belonging to a belligerent power there must

be a rebellion; the rebels also must have established something like a government, to do certain acts upon the high seas against neutral ships. If a cruiser did commit acts of depredation without authority, the neutral states would demand satisfaction. If the *Huascar* was a belligerent, she would be responsible. In strictness the crew of the *Huascar* were pirates and might have been treated as such; but it was one thing to say that, according to the strict letter of the law, people have been guilty of acts of piracy and another to advise that they should be tried for their lives and hanged at Newgate. The *Huascar* was called upon to surrender, and she refused. The admiral took steps accordingly to make her surrender." (Halleck, Baker's ed. International Law, Vol. I, p. 449.)

Piracy according to international law.—Piracy in the international sense is not a political act, but an act implying *animus furandi*, an act entered upon in a spirit of robbery or marked violence. It is not aimed against any particular state or the citizens of any particular state. Lawrence gives, among the marks of a piratical act, that it be "an act of violence adequate in degree;" "an act done outside the territorial jurisdiction of any civilized state;" and "an act the perpetrators of which are destitute of authorization from any recognized political community;" or, as Lawrence says, in summarizing, "An act to be piratical must be of adequate violence; it must be committed outside the jurisdiction of a civilized State; and it must possess no national authorization." (International Law, section 122, p. 210.)

Application to the Situation.—It is evident that it is not the policy of the United States to regard insurgent vessels as pirates, and hence this vessel while seizing a vessel within the harbor of State X can not be considered as a pirate from the point of view of international law.

The act is committed within the jurisdiction of State X and in derogation of the sovereignty of State X. It is unquestionably a violation of the laws of State X, and for the act State X may prescribe the punishment.

As the act is not piracy in fact or in intent, the United

States commander should not, if he overtakes the vessel on the high seas, treat it as piratical.

By the statement of the situation, the commander of the United States war vessel does meet the seized vessel, the *Robin*, on the high seas.

He may not treat the case as one of piracy, but it certainly is an offense which comes within his jurisdiction. This is a case of a merchant vessel which needs his protection and the regulation of the service would apply.

U. S. Navy Regulations, 1900, 309, prescribe that,

> So far as lies within their power, commanders-in-chief and captains of ships shall protect all merchant vessels of the United States in lawful occupations and advance the commercial interests of this country, always acting in accordance with international law and treaty obligations.

The *Robin* has been seized within the jurisdiction of the State X and is now upon the high seas. It is evident that State X is not in full control of the port in which the *Robin* was seized. From the nature of the case, also, the insurgents who seized the *Robin*, while not pirates, are not a responsible body and can not be dealt with as such by the United States. As they are not belligerents the seizure of the *Robin* can not be permitted under the right of angary. Nor does the promise to make compensation to the owners in any way change the case, as the insurgents who seized the *Robin* are not a responsible body at the time and their future responsibility is uncertain. That the seizure is not with the approval of the owners is evident from the request of the owners that the vessel be recovered by the United States war vessel.

In 1885, in Colombia, certain vessels belonging to neutrals were taken by insurgents in a manner somewhat similar to that in the case of the *Robin*. At this time Mr. Wharton, Solicitor for the Department of State, gave his opinion as follows:

> When vessels belonging to citizens of the United States have been seized and are now navigated on the high seas by persons not representing any government or belligerent power recognized by the United States, such vessels may be captured and rescued by their owners, or by United States cruisers acting for such owners: and all force which is necessary for such purpose may be used to make the capture effectual. (U. S. Foreign Relations, 1885, p. 212.)

From the above, which is an accepted precedent, it is evident that the commander of the United States war vessel would be justified in seizing the United States merchant vessel which the insurgents had taken.

Conclusion.—The commander of the cruiser of the United States is justified in making a capture of the *Robin*. What disposition shall he make of the captured vessel? While the naval officer is justified in making the capture, he has not authority, except in extreme instances, to dispose of or determine the fate of a captured vessel. That authority belongs to another branch of the Government. He should therefore send in the captured vessel, if possible, to a port of his own country with a report of the case. If distance or other circumstances prevent such action, he should take the vessel under his authority to some port near by and obtain instructions from his home Government as to the further disposition of the vessel.

The question of damages from State X on account of seizure of the *Robin* within that State's jurisdiction is a matter for diplomatic negotiation.

Situation III, (*c*).

There is an insurrection in State X.

(*c*) State X charters a United States merchant vessel to transport troops to the seat of insurrection. When the vessel is about to land these troops it is captured by the insurgents. The captain of the United States merchant vessel appeals for assistance to the commander of a United States war vessel near by.

(1) What action, if any, should he take?

(2) How would he act if the troops of State X had been landed before the capture of the vessel?

Solution.

(1) The commander of the United States war vessel should reply that "while the United States would not interfere to prevent an American vessel from voluntarily carrying arms and troops in the service of a government trying to put down an insurrection, it would leave the vessel and its crews so voluntarily entering into such service to the consequences of establishing such a relation."

(2) Provided the merchant vessel has fulfilled its charter contract and is no longer in the service of State X after landing the troops, the commander of the United States war vessel should extend to the merchant vessel full protection.

NOTES ON SITUATION III, (*c*).

Nature of the relations.—The fact of the insurrection is admitted. State X enters into a contract with the merchant vessel of the United States to transport troops to the seat of the insurrection.

As there is no belligerency from the point of view of international law, this becomes a simple commercial contract in which certain service is rendered under a certain agreement. The nature of the service is a question of importance.

It has been held by the Supreme Court of the United States that a recognition of belligerency is not necessary in order to bring into operation the neutrality laws of the United States. (166 U. S., 49.)

"It may be said to be established that the parties to a conflict that has attained the proportion of an insurrection shall observe, as far as possible, the rules of civilized warfare." (Insurgency, Lectures, Naval War College, 1900, p. 13.)

It is generally admitted at the present time that insurgents are not criminals when pursuing public political ends, and also that insurgents are free to carry on legitimate hostilities, though it is maintained that the conduct of these hostilities should not unduly interfere with neutral commerce. Admiral Benham, at the time of the Brazilian revolt of 1893–94, maintained that while neutral commerce was liable to interruption during the actual continuance of active hostile operations in time of an insurrection, at other times ordinary commerce should not be interrupted because of such internal disturbances.

In case of State X there is no belligerency in the sense in which the word is used in international law. There is, however, an insurrection, which is held to bring into operation certain of the laws applying to a state of belligerency so far as the parties to the struggle are concerned. Just how far third states and the citizens of other states

are affected by the existence of insurrection in a given state is not yet determined.

Bluefields, 1894.—An instance somewhat similar to the one under consideration occurred in 1894, at the time of the Bluefields insurrection. The conditions, as shown from the official correspondence, were as follows:

Mr. Baker to Mr. Gresham.

LEGATION OF THE UNITED STATES,
Managua, August 8, 1894—(Received September 4).

SIR: On the evening of August 2 Mr. Gustavo Guzman came to this legation bearing, as he informed me, a verbal message from the President, to the following effect:

First. That this Government had sent a large number of troops to San Juan del Norte, where they had just arrived, on their way to Bluefields.

Second. That this Government had chartered the steamboat *Yulu*, a boat owned by the Emory Company of Boston, flying the United States flag, to transport these troops from San Juan del Norte to Bluefields.

Third. That now the captain and crew of the *Yulu*, all Americans, refuse to carry the soldiers, for the reason that Commander O'Neil, of the U. S. S. *Marblehead*, had issued a proclamation forbidding vessels under the flag of the United States from "carrying bodies of armed men or military supplies" for either "party" to the controversy in the Mosquito territory.

Fourth. The President, therefore, requested that I, as United States minister, issue an order to the captian and crew of the steamer *Yulu*, assuring them that they run no risk in disobeying the warning of Commander O'Neil.

I could not believe it to be my duty to comply with this request; but, at the suggestion of Mr. Guzman, I gave him the accompanying telegram, marked "Inclosure No. 1," which he had liberty to send if he so desired. Inclosure No. 2 is a copy of the proclamation of Commander O'Neil referred to.

I have, etc.,

LEWIS BAKER.

[Inclosure.]

Mr. Baker to Commander O'Neil.

LEGATION OF THE UNITED STATES,
NICARAGUA, COSTA RICA, AND SALVADOR,
Managua, August 2, 1894.

Commander O'NEIL,
U. S. S. Marblehead, Bluefields:

The Nicaraguan Government had chartered, as I learn, the steamer *Yulu*, belonging to a company of Americans, to carry troops from Grey Town to Bluefields. The President desires to know if this is contrary to your order commanding the neutrality of American citizens. Please answer, in care of Consul Braida, Grey Town.

LEWIS BAKER,
United States Minister.

(Foreign Relations U. S., 1894, p. 321.)

[Inclosure.]

U. S. S. MARBLEHEAD,
Off Bluefields, Nicaragua, July 14, 1894.

To the owners, agents, and captains of vessels under the flag of the United States trading in these waters:

In view of the fact that there is in effect a revolution going on in the Mosquito Reserve between the chief of the said reserve and his followers and the provisional council, which in a measure through its president represents, or assumes to represent, the Government of Nicaragua, these parties being in hostile attitude to each other, and the former being at present in possession at Bluefields, you are hereby cautioned and counseled not to interfere with nor take part in the affairs of either faction by permitting vessels under your charge to engage in any military operations, that is, not to carry bodies of armed men or military supplies, knowing them to be such, for either party, nor to assist in any hostile demonstration; and should either party attempt to coerce you to do so, or interfere with you in the peaceful pursuance of your legitimate business, you are advised to utter a vigorous protest, to show this notice, and to communicate the facts of the case to me.

CHARLES O'NEIL,
Commander, United States Navy.

(Foreign Relations, U. S., 1894, Appendix I, p. 321.)

It will be observed that Commander O'Neil had not, as was intimated by the Nicaraguan representative, *forbidden* vessels under the United States flag "to carry bodies of armed men or military supplies, knowing them to be such, for either party, nor to assist in any hostile demonstration." What he actually did was to *caution* and *counsel* "owners, agents, and captains of vessels under the flag of the United States" against such action. Subsequent events showed the wisdom of the notice issued as cautionary by Commander O'Neil. The sworn statement of the purser of the steamship *Yulu*, before Consular Agent Seat, is as follows:

Affidavit of N. L. Latson.

UNITED STATES CONSULAR AGENCY,
Bluefields, Nicaragua, September 22, 1894.

This day, before me, the undersigned authority, personally came and appeared Norman L. Latson, to me known, and on his oath declares that heretofore, to wit, on or about the 3d day of August, 1894, affiant was purser on board the American steamship *Yulu*, which arrived off Bluefields on the 3d day of August, 1894, having on board 500 or thereabouts Nicaraguan soldiers and officials, among whom were Mr. José Madriz, Nicaraguan minister of foreign affairs; General Portocarrero, judge-advocate, and Carlos

Lacayo, ex-commissioner of the Mosquito Reserve. Affiant further states that upon approaching the U. S. S. *Columbia*, which was at anchor off Bluefields, the captain of the *Yulu* signaled that he had on board the abovementioned troops and soldiers under protest.

He was thereupon ordered by the U. S. S. *Columbia* to anchor alongside, and was shortly afterwards boarded by Lieut. O. W. Lowry, of said vessel. Lieutenant Lowry refused to allow the captain of the steamship *Yulu* to disembark the Nicaraguan troops aboard until he had communicated with Captain Sumner, of the steamship *Columbia*, who was in the town of Bluefields. He directed Captain Johnson to take the steamship *Yulu* into the harbor of Bluefields and to come to an anchor there. Lieutenant Lowry also placed aboard the steamship *Yulu* a boat's crew of 11 men, in charge of Ensign Kuenzli, who was to prevent the disembarkation of the Nicaraguan troops until the return of Lieutenant Lowry, who went into the town in the steam launch of the *Columbia* to receive instructions from Captain Sumner. Lieutenant Lowry offered to convey Minister Madriz and any of his officers into the town in his steam launch, but the proffered offer was refused, whereupon Lieutenant Lowry stated that he would return with Captain Sumner's answer in the shortest possible time, probably two hours.

Affiant further states that the Nicaraguan officials were very indignant at the refusal to allow them to disembark the troops at once, and indulged in strong language against the action of the United States. As time passed the excitement and indignation among them began visibly to increase. The water tanks of the steamship *Yulu* had been left open by the Nicaraguan soldiers during the night and all the fresh water allowed to escape, and the aforesaid soldiers were clamoring for water during their detention. Finally, some of the officials made signals to the Government wharf, about 50 yards away, at which was stationed a force of Nicaraguan soldiers, and two boats were sent out to the steamship *Yulu* in response. Affiant further states that in the wheelhouse of the steamship *Yulu* were Ensign Kuenzli with two men, the remainder at the time of the occurrence being disposed about the roof of the upper deck. There were also present Carlos Lacayo, Ramon Enriquez, a merchant from Grey Town, Nicaragua, and the affiant, Norman L. Latson. The latter, leaning out of the window of the wheelhouse, heard Minister Madriz, who was accompanied by Judge-Advocate Portocarrero, order Captain Johnson, of the steamship *Yulu*, to take his vessel in to the Government wharf at once and discharge the troops. This Captain Johnson refused to do, stating that his vessel was in control of the officer from the U. S. S. *Columbia*, and therefore not in his power to obey such a demand.

Affiant further states that thereupon Judge-Advocate Portocarrero, closely followed by Minister Madriz, rushed into the wheelhouse of the steamship *Yulu*. They were both white with anger, and Portocarrero had in his right hand, with his finger on the spring, a clasp knife with a blade about 8 inches long. Ensign Kuenzli sat on a portion of the steering gear of the steamship *Yulu*, within a few feet of Portocarrero, and with his back toward him. He was reading, but remarked later that he was aware something serious was impending. The two other men from the *Columbia* were on the opposite side of the wheelhouse, looking out of a window, and with their backs also turned to the Nicaraguan officials. Most of the rifles

belonging to the man-of-war's men were stacked in this wheelhouse, and the Nicaraguans were aware that it would be almost impossible for the men who were on the roof to reach them in case of sudden attack. There were at least 100 Nicaraguans on the upper deck of the steamship *Yulu*, and completely surrounding the wheelhouse.

When Madriz and Portocarrero rushed into the wheelhouse they gathered around the two doors, which open onto the deck, and, with fixed bayonets and drawn swords, listened to what transpired. Portocarrero commenced a violent and insulting tirade against the United States, claiming, among other things, that her action in refusing to allow Nicaraguan troops to disembark was cowardly and the tyrannical oppression of a small and defenseless country by a large and powerful one. Madriz agreed with him, and stated that he considered this action an insult to Nicaragua through him; he further said that they had agreed to wait two hours for an answer and that nearly three had elapsed. Portocarrero then said, turning to Madriz: "Let us make them take the ship to the wharf and disembark the troops." Affiant then said: "You are making a serious mistake, General Portocarrero, and do not understand the circumstances of this detention."

Portocarrero appeared to lose control of himself, and being seconded by some encouraging exclamations from the crowd around the doors, he raised his knife and, pointing toward the young officer, said to Madriz: "You give the command and I will throw myself upon him, and we will take the ship in to the wharf against any resistance on their part." At this instant, and before Minister Madriz could reply, Captain Johnson, of the steamship *Yulu*, stepped into the room and said that he saw smoke across the lagoon, and believed that the launch was returning. Madriz then turned to Portocarrero, who still stood, knife in hand, and said: "We will wait and see whether it is the launch; we will give them half an hour more, and if it is not, we will go in anyhow." Both Lacayo and Enriquez endeavored to dissuade Portocarrero from the position he had taken, but they were not listened to. The smoke mentioned by Captain Johnson proved to be from the steam launch of the *Columbia*, and in due time Lieutenant Lowry reached the steamship *Yulu* with instructions from Captain Sumner to permit the disembarkation of the Nicaraguan troops.

Affiant further states that from his knowledge of the mood and temper of the Nicaraguan officials, and from the threats he personally heard expressed, he deposes and says that he believes a disaster and massacre aboard the steamship *Yulu* was only averted by the timely sighting of the *Columbia's* steam launch.

Affiant further states that he is a native of the United States, born in the State of New York, and for five years a resident of Nicaragua. He also states that he thoroughly understands Spanish, in which language the above remarks were made.

NORMAN L. LATSON.

Sworn to and subscribed before me this September 22, A. D. 1894.

B. B. SEAT,

United States Consular Agent.

(Foreign Relations, U. S., 1894, Appendix I, p. 344.)

From this statement it is seen that the troops were allowed to disembark and the captain was permitted to depart with his vessel.

This precedent would seem to indicate that the action of the commander might be limited to the issuing of the notice of caution and council so far as the transportation and landing of the troops may enter into the case.

Effect of charter.—In the situation under consideration, however, as the troops are about to land, the merchant vessel chartered by State X is captured by the insurgents and the captain appeals to the commander of the United States war vessel for assistance. There is no war in the full international sense in State X, yet as was said in the case of *The Three Friends* (166 U. S., p. 63), there is a "distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and of war in a legal sense." The court further held that the neutrality laws of the United States extended in this time of war in a material sense to prohibition of certain acts forbidden to a neutral in the time of war in a legal sense.

It is affirmed that the merchant vessel here considered is a United States vessel and is consequently entitled to proper protection as such. In general the character of a merchant vessel is determined by its flag and its papers. In this case there is no intimation that the papers of the United States merchant vessel are not correct in all respects. The one fact is that the merchant vessel is engaged under contract with State X in transporting troops to the seat of insurrection when she is seized as the troops are about to land.

The vessel has not completed her contract with State X. The vessel is not captured on the high seas. On this last account the United States war vessel would ordinarily hesitate to exercise jurisdiction because within the three-mile limit the local jurisdiction is supposed to prevail. Under certain circumstances when a state is disturbed by domestic violence a commander would be justified in interfering for the protection of the interests and persons of citizens of his own state.

This vessel, by accepting the charter from State X for

the transportation of troops to that extent, engages in the military expedition against the insurgents and assumes the consequent risks. Halleck (International Law, Baker's ed., I, p. 438), says: "The national character of ships is, as a general rule, determined by that of their owners. But, as hereafter shown, this rule is subject to many exceptions, a hostile character being not infrequently impressed upon the vessel while its owners are neutrals or friends. Thus, a hostile flag and pass, the carrying of military persons or dispatches of an enemy, trading between enemy's ports, etc., will give to a vessel a hostile character, no matter what may be that of its owners." And again (Vol. II, p. 97) "So, a ship belonging to a neutral owner may acquire a hostile character from the trade in which she engages or some particular act which she may do."

In speaking of several cases where neutral vessels enter belligerent service in time of war Dana, in a note to Wheaton's International Law (note 228, p. 643), says:

> If a vessel is in the actual service of the enemy as a transport, she is to be condemned. In such case it is immaterial whether the enemy has got her into his service by voluntary contract, or by force or fraud. It is also, in such case, immaterial what is the number of the persons carried, or the quantity or character of the cargo; and, as to despatches, the court need not speculate upon their immediate military importance. It is also unimportant whether the contract, if there be one, is a regular letting to hire, giving the possession and temporary ownership to the enemy, or a simple contract of affreightment. The truth is, if the vessel is herself under the control and management of the hostile government, so as to make that government the owner pro tempore, the true ground of condemnation should be as enemy's property.

The quotations apply to a state of war.

Mr. Bayard, in a letter of December 3, 1886, says

> "If in that (a foreign) country," said Mr. Webster, "he (a citizen of the United States) engages in trade or business he is considered by the law of nations as a merchant of that country;" and in this and other cases ruled in this Department on this principle, it was held that citizens of the United States who engage in insurrectionary movements in Cuba thereby expose their property to seizure by Cuban authorities, and had no claim on this Government to secure indemnity for them from Spain. Nor can Spanish subjects (under similar circumstances) make claim against the United States for losses incurred by them through confiscation of their goods in the late civil war, such confiscation being in conformity with the laws of war." (III Wharton, International Law Digest, p. 968.)

It has been affirmed that even "by voluntarily remaining in a country in a state of civil war they (subjects of foreign powers) must be held to have been willing to accept the risks as well as the advantages of that domicil." (Ibid, II, p. 578.)

From such statements it is evident that those who voluntarily come within the range of insurgent military action must assume the responsibility thus incurred.

The United States merchant vessel voluntarily accepted a charter which in its purpose was to bring the vessel as a part of an actual military expedition within the field of what the Supreme Court has called "war in a material sense;" and, more than that, the vessel has distinctly identified itself with the military forces of State X to the extent of transporting its troops to the seat of hostilities.

Under these conditions the vessel is wholly within the jurisdiction of State X for its charter purpose and must look to State X for protection and assistance.

Opinion of Department of State.—The Government of the United States has set forth its position in the correspondence as printed in the Foreign Relations for 1897 (p. 331). This position will be seen to accord with the general line of precedent and argument which has prevailed in the United States.

THE TRANSPORTATION OF CENTRAL AMERICAN TROOPS AND MUNITIONS OF WAR IN UNITED STATES VESSELS.

Mr. Rodriguez to Mr. Sherman.

LEGATION OF THE GREATER REPUBLIC OF CENTRAL AMERICA,
Washington, April 17, 1897.

SIR: Conformably to our conversation of yesterday, I have the honor to address this communication to your excellency.

My Government desires to transport troops and implements of war from a port in Honduras, or from the Confederation, to any port in the same State, on the Atlantic or Pacific, with the object of reestablishing order along the first of the above-named coasts; and in the event of being able to charter, for this purpose, American vessels, it trusts the consuls of the United States at Ceiba and Trujillo, or at any other place along the said coasts, will put no obstacles in the way. My Government solicits this friendly office of your excellency without prejudice to the right which it may have in accordance with international law.

I reiterate, etc., J. D. RODRIGUEZ.

Mr. Sherman to Mr. Rodriguez.

DEPARTMENT OF STATE,
Washington, April 20, 1897.

SIR: I have the honor to acknowledge the receipt of your note of the 17th instant, in which, referring to our conversation of the 16th, you state the desire of your Government to transport troops and munitions in the same State on the Atlantic or the Pacific, with the object of reestablishing order along the Atlantic coast, and that in the event of your Government being able to charter American vessels for this purpose it trusts that the consuls of the United States at Ceiba and Trujillo, or at any other place along the said coast, will put no obstacles in the way.

If, as would appear, the proposed chartering of American vessels by your Government contemplates a regular contract with the owners or agents of such vessels, not compulsory but voluntary on their part, it is not perceived how the consuls of the United States could interpose any valid objections to a legitimate transaction which the representatives of the American owners may be legally competent to effect.

Copy of this correspondence will, however, be sent to the United States minister to Guatemala and Honduras and to the consular officers in the latter country for their information.

Accept, etc., JOHN SHERMAN.

Mr. Sherman to Mr. Coxe.

DEPARTMENT OF STATE,
Washington, April 21, 1897.

SIR: I inclose herewith for your information copy of notes from and to Señor J. D. Rodriguez, the minister of the Greater Republic of Central America at this capital, in regard to the desire of his Government to charter American vessels for the purpose of transporting troops and munitions of war with object of reestablishing order along the Atlantic coast.

You will observe the Department's reply that if the proposed chartering of American vessels by his Government contemplates a regular contract with owners or agents of such vessels, not compulsory but voluntary on their part, it can not be perceived how the consuls of the United States could interpose any objections to a legitimate transaction which the representatives of the American owners may be legally competent to effect.

If, however, there should be any appearance of coercion on the part of the employing Government, the consul's intervention would be justified. The owners of the vessels should also understand that they can not expect the United States to intervene in their behalf should the employing Government fail to pay them for their services, for while the United States would not interfere to prevent an American vessel from voluntarily carrying arms and troops in the service of a Government trying to put down an insurrection, it would leave the vessel and its crews so voluntarily entering into such service to the consequences of establishing such a relation.

Should a seaman employed for other services desire to be discharged, he ought not to be compelled to serve in the transportation of arms and troops.

Respectfully, yours, JOHN SHERMAN.

(Foreign Relations U. S., 1897, p. 331.)

Conclusion—(1). The commander of the United States war vessel should therefore reply that "while the United States would not interfere to prevent an American vessel from voluntarily carrying arms and troops in the service of a government trying to put down an insurrection, it would leave the vessel and its crews so voluntarly entering into such service to the consequences of establishing such a relation."

The issue of any such notice of caution and counsel as that issued by Commander O'Neil is not mandatory, though in may be, on occasion, advantageous.

(2) In the situation in which the troops had already been landed before the capture of the merchant vessel the relations may be materially changed, provided the charter provision extend merely to the transportation of the troops to the seat of the insurrection, and provided that the merchant vessel has met the provisions of the contract and is no longer connected with the expedition.

As this is not war in "the legal sense," but only "in the material sense," the vessel has simply performed a mercantile act for the established Government, and upon its completion the vessel resumes its status as a merchant vessel of the United States.

The commander should therefore extend to the vessel the ordinary protection and would not permit capture of the vessel no longer concerned in the insurrection, or if the vessel had been captured after fulfilling its contract he should demand and secure its immediate release. The insurgents are not a responsible body. They have no prize courts or other means of enforcing the laws of war. They are therefore entitled to use force against neutrals only when this is absolutely essential in the actual conduct of active hostilities.

Mr. Hay has clearly enunciated the position in a letter to the Secretary of the Navy of November 15, 1902, in which he says.

But in no case would the insurgents be justified in treating as an enemy a neutral vessel navigating the internal waters, their only right being, as hostiles, to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. No right of confiscation or destruction of foreign property in such circumstances could well be recognized, and any act of injury so committed against foreigners would necessarily be at the risk of the insurgents. The question of the nature and mode of the redress which may be open to the government of the injured foreigners in such a case hardly comes within the purview of your inquiry, but I may refer to the precedents heretofore established by this Government in the enunciation of the right to recapture American vessels seized by insurgents.

I have the honor to be, sir, your obedient servant,

JOHN HAY.

(International Law Situations, Naval War College, 1902, p. 82.)

SITUATION III, (*d*).

There is an insurrection in State X.

(*d*) Mr. Smith, a citizen of the United States, is implicated in this insurrection in State X, and is sent out of the country. Mr. Smith, as a passenger upon a vessel of State Y, subsequently enters a port of State X. While upon the vessel he is arrested by the authorities of State X. He then appeals to the commander of a United States war vessel to obtain his release, stating that the action of the authorities of State X was illegal and unjustifiable.

What action, if any, should the commander take?

SOLUTION.

The commander could not claim the delivery or release of Mr. Smith to him, "but would have to limit his action to the exercise of good offices, so far as possible in conjunction with" other representatives of the United States to secure for Mr. Smith "fair and open process of law, with every opportunity for defense, and if convicted, leniency of treatment." He should, if possible, warn Mr. Smith of the risk he runs in again entering the jurisdiction of State X. It is a general principle that representatives of the United States in a foreign harbor "can neither assist in nor resist the orderly operation of the law of the port."

NOTES ON SITUATION III, (*d*).

Questions suggested by the Situation.—Two questions naturally arise in connection with this situation, (*a*) the question of asylum for insurrectionists upon merchant

vessels, and (*b*) the question of intervention for the protection of those involved in insurrection, who, after being sent out of the State, return to its jurisdiction upon a foreign merchant vessel.

The statement by Mr. Smith that "The action of the authorities of State X was illegal and unjustifiable" involves other questions also.

The general position is expressed by the Department of State:

> The instructions to diplomatic officers of the United States provide in regard to citizens of the United States that the diplomatic officers should countenance and protect "citizens" before the authorities "of the foreign country" in all cases in which they may be injured or oppressed, but their efforts should not be extended to those who have been willfully guilty of an infraction of the local laws. It is their duty to endeavor, on all occasions, to maintain and promote all rightful interests and to protect all privileges that are provided for by treaty, or are conceded by usage. If representations made to the authorities of the countries fail to secure proper redress the case should be reported to the Department of State.

The vessel upon which Mr. Smith is a passenger belongs to State Y. The commander of the war vessel of the United States has, of course, no jurisdiction over this vessel under ordinary circumstances. He might at any time use his good offices to prevent, so far as possible, injustice to a citizen of the United States. After his arrest Mr. Smith is within the jurisdiction of State X. The question then becomes one between the United States and State X, and if the arrest is illegal there may also be a case between State Y and State X. Whether Mr. Smith, who has been concerned in stirring up opposition against State X, can claim any immunity from the fact that he is on a merchant vessel or a passenger vessel of a foreign state within a port of State X is one of the points to be settled. The commander of the war vessel would be justified in any case in demanding that the ordinary procedure for arrest of offenders against State X be followed, so far as the exigencies of the disturbed condition of State X permitted. Whether he could demand more than this and a fair trial for the offense committed, involves the matter of asylum for political offenders upon private vessels of a foreign state in the time of an insurrection within a given state.

(a) *The question of asylum for insurrectionists upon merchant vessels.*

The opinions rendered at various times on the subject are not entirely in accord.

The Barrundia case.—The case of General Barrundia has been particularly discussed.

In a long dispatch bearing the date of November 18, 1890, Mr. Blaine discusses the case of General Barrundia, who had been shot while resisting with force arrest on board the Pacific mail steamer *Acapulco*, sailing under the American flag and plying between Pacific ports. General Barrundia had secured passage for Panama, and had embarked at a Mexican port. He was a political exile from Guatemala. The captain of the *Acapulco* requested of Mr. Mizner information as to what he should do in reply to the Guatemalan demand for the arrest of General Barrundia when the *Acapulco* anchored in a Guatemalan port. After a telegram, which the captain of the *Acapulco* did not regard as sufficient, Minister Mizner sent to the captain of the *Acapulco* the following letter:

Mr. Mizner to Captain Pitts.

UNITED STATES LEGATION,
Guatemala, August 27, 1890—10.30 p. m.

SIR: If your ship is within 1 league of the territory of Gautemala, and you have on board Gen. J. M. Barrundia, it becomes your duty, under the laws of nations, to deliver him to the authorities of Gautemala upon their demand, allegations having been made to this legation that said Barrundia is hostile to and an enemy to this Republic. Guaranties have been made to me by this Government that his life shall not be in danger, or any other punishment inflicted upon him than for the causes stated in the letter of Señor Anguiano to Consul-General Hosmer, dated yesterday.

I have, etc.,

LANSING B. MIZNER,
United States Minister.

Capt. W. G. PITTS,
Commanding Pacific M. S. S. Co.'s Steamship Acapulco.

(For. Relations of U. S., 1890, p. 85.)

Commander Reiter had telegraphed to Minister Mizner on August 27, 1890, at 8 p. m., as follows:

SAN JOSÉ DE GUATEMALA,
August 27, 1890.

MIZNER, *United States Minister:*

Barrundia expected in steamer. As peace is declared, I suggest that you ask Government to permit *Thetis* to take him to Acapulco, we acknowledging their municipal rights over steamer. Steamer *Acapulco* in sight.

REITER.

On the following day Commander Reiter sent a letter detailing the course of events:

Commander Reiter to Mr. Mizner.

U. S. RANGER, *August 28, 1890.*

DEAR SIR: On receipt of your telegram about 6.30 p. m. yesterday, I went ashore and sent one to you at 7 p. m. I requested the commandant to postpone action until I received a reply, which he declined to do. I waited until after 9 o'clock for a reply from you, and believe that my dispatch did not go or that your reply was delayed, as I did not receive it until 9.30 this morning. Am sorry my reply was too late.

The commandant did not take any action last night, but did to-day. At about 2.30 we thought we heard firing on board the *Acapulco*, and a few minutes after the Guatemalan flag was hauled down from the fore and the United States flag hoisted. I then thought you had come down and were on board, but learned later that it was intended to call assistance. Lieutenant Bartlett soon came on board from the *Acapulco* and reported that the commandant was on board the *Acapulco*, and that promiscuous firing had been going on, and that the captain desired protection. I immediately started, and was followed a few minutes later by Lieutenant Harris with an armed guard of marines. On arrival I found that the commandant had left with the body of Barrundia, and that all was quiet, so I sent Lieutenant Harris back.

The following is as near as I could learn what occurred: When the commandant arrived on board he delivered your letter to Captain Pitts, and they both went to the captain's room, where it was read. The captain then sent the first officer, Mr. Brown, to send all cabin passengers below and to warn the steerage passengers to keep forward. The captain and commandant then went to Barrundia's room. They stood outside, one on each side of the door, while Barrundia was inside smoking a cigarette. The captain then told him of the letter, and he could not afford him further protection. The commandant then said something to him in Spanish, to which Barrundia replied, 'Bueno," when he quickly seized a revolver from the upper berth and fired two or three shots out of the door. The captain and commandant beat a hasty retreat aft and took refuge in a stateroom, followed by Barrundia firing wildly. He passed out to the port side of the deck, then forward across to the starboard side through social hall, then back through social hall, and turned to go forward on the port side, when he fell.

It was impossible to point out just where the detectives were all the time. Some say they were on the starboard side, and first shot and wounded Barrundia when he appeared on that side, but the certain result was that he died where he fell, pierced by several bullets. He must have been terribly excited or scared not to have done any damage to his enemies, for he had everything his own way for a few minutes.

I am sorry you have not been well since your trip to Acajutla, but hope you are all right again.

Commander Stockton returned yesterday. Everything is quiet at La Union and Amapala.

Very sincerely,

GEO. C. REITER.

Hon. L. B. MIZNER,
United States Minister, Guatemala.

(Foreign Relations U. S., 1890, p. 86.)

President's statement.—The point of view of the United States Government at the time was set forth in the President's message of December 1, 1890:

The killing of General Barrundia on board the Pacific mail steamer *Acapulco*, while anchored in transit in the port of San José de Guatemala, demanded careful inquiry. Having failed in a revolutionary attempt to invade Guatemala from Mexican territory, General Barrundia took passage at Acapulco for Panama. The consent of the representatives of the United States was sought to effect his seizure, first at Champerico, where the steamer touched, and afterwards at San Jose. The captain of the steamer refused to give up his passenger without a written order from the United States minister. The latter furnished the desired letter, stipulating, as the condition of his action, that General Barrundia's life should be spared, and that he should be tried only for offenses growing out of his insurrectionary movements. This letter was produced to the captain of the *Acapulco* by the military commander at San Jose, as his warrant to take the passenger from the steamer. General Barrundia resisted capture and was killed. It being evident that the minister, Mr. Mizner, had exceeded the bounds of his authority in intervening, in compliance with the demands of the Guatemalan authorities, to authorize and effect, in violation of precedent, the seizure on a vessel of the United States of a passenger in transit charged with political offenses, in order that he might be tried for such offenses under what was described as martial law, I was constrained to disavow Mr. Mizner's act and recall him from his post.

(President's Message, December 1, 1890.)

Subsequent statements.—The position of the United States has been officially stated in certain correspondence subsequent to that upon the Barrundia affair. This correspondence implies that the criticism of Mr. Mizner's

action in the case of General Barrundia was in consequence of his assuming to give the Guatemalan authorities an order for the surrender of the accused, (General Barrundia).

GUATEMALA AND HONDURAS—LOCAL JURISDICTION OVER FOREIGN MERCHANT SHIPS.

Mr. Huntington to Mr. Gresham.

PACIFIC MAIL STEAMSHIP COMPANY,
35 Wall Street, New York, December 13, 1893.

SIR: Referring to our letter of the 11th of November last, we again beg to call the attention of the Department to the request contained in the closing paragraph, reading:

"In view of the fact that it is not the first case on record in which the commanders of our steamers plying on the Central American coast have been called on to deliver to the authorities of the different republics passengers on their steamers (accused of political offenses against said republics), and under their charge and protection of our flag, we would esteem it a favor if some definite action should be taken by the Department, by prompt intervention in this instance, to secure protection in the future for passengers, cargo, and mails carried by our steamers, and that a definite policy be outlined by our Government and communicated to this company, in order that such instructions may be issued to our commanders as will properly secure the protection of our ships and prevent any misunderstanding on the part of our officers which might contravene and confuse the wishes of our Government and involve the Department, as well as this company, in needless complications."

The Department will readily understand that without some such definite indication of the policy of our Government in connection with these cases it is impossible for us to lay down a fixed rule for the governance of our commanders on the Pacific coast under which they shall act intelligently in such emergencies.

We trust, therefore, that, in the light of all the facts in connection with this incident now in the possession of the Department, it may be deemed consistent to comply promptly with our request as above indicated.

I have, etc.,

C. P. HUNTINGTON, *President.*

Mr. Gresham to Mr. Huntington.

DEPARTMENT OF STATE,
Washington, December 30, 1893.

SIR: I have given attention to your letter of the 13th instant, in which you refer to the recent firing upon your steamer *Costa Rica* in the Honduran port of Amapala, and repeat the suggestion contained in your letter of November 11, 1893, that a definite policy in respect to surrendering accused criminals when claimed by the local authorities in a port of call be outlined for the guidance of your commanders.

It is not practicable to lay down a general fixed rule applicable to the varying conditions in such cases. As a comprehensive principle, it is well established in international law that a merchant vessel in a foreign port is within the local jurisdiction of the country with respect to offenses or offenders against the laws thereof, and that an orderly demand for surrender of a person accused of a crime by due process of law, with exhibit of a warrant of arrest in the hands of the regularly accredited officers of the law, may not be disregarded nor resisted by the master of the ship. On the same voyage when the Amapala incident occurred Captain Dow appears to have acted upon this principle in allowing the arrest at other ports, on proper judicial warrant, of two or three other passengers accused of crime. That the passenger may have come on board at the port where the demand is made or at another port of the same country is immaterial to the right of local jurisdiction.

Arbitrary attempts to capture a passenger by force, without regular judicial process, in a port of call may call for disavowal when, as in the present case at Amapala, the resort to violence endangers the lives of innocent men and the property of a friendly nation. Whether, if force be threatened, the master of the vessel is justified in putting in jeopardy, by his resistance, the interests committed to his care must be largely a question for his discretion. It is readily conceivable that the consequences of futile resistance to overpowering force may be such as to make the resistance itself unwarrantable.

The so-called doctrine of asylum having no recognized application to merchant vessels in port, it follows that a shipmaster can found no exercise of his discretion on the character of the offense charged. There can be no analogy to proceedings in extradition when he permits a passenger to be arrested by the arm of the law. He is not competent to determine whether the offense is one justifying surrender or whether the evidence in the case is sufficient to warrant arrest and commitment for trial, or to impose conditions upon the arrest. His function is passive merely, being confined to permitting the regular agents of the law, on exhibition of lawful warrant, to make the arrest. The diplomatic and consular representatives of the United States in the country making the demand are as incompetent to order surrender by way of quasi-extradition as the shipmaster is to actively deliver the accused. This was established in the celebrated Barrundia case by the disavowal and rebuke of Minister Mizner's action in giving to the Guatemalan authorities an order for the surrender of the accused.

If it were generally understood that the masters of American merchantmen are to permit the orderly operation of the law in ports of call, as regards persons on board accused of crime committed in the country to which the port pertains, it is probable on the one hand that occasions of arrest would be less often invited by the act of the accused in taking passage with a view to securing supposed asylum, and, on the other hand, that the regular resort to justice would replace the reckless and offensive resort to arbitrary force against an unarmed ship, which, when threatened or committed, has in more than one instance constrained urgent remonstrance on the part of this Government.

I am, etc., W. Q. Gresham.

(Foreign Relations U. S., 1894, p. 296, 297.)

Mr. Bayard's letter of November 3, 1885, implies that "Neither a diplomatic nor consular officer can oppose the taking of a supposed criminal from an American vessel in port," and that of November 7, 1885, says: "Nor can he order the surrender of such criminal." On March 12, 1885, Mr. Bayard states: "Vessels entering foreign ports are, unless exempted by treaty, amenable to the jurisdiction of the country."

Mr. Blaine's position in 1890 was to the effect that "the practice in Spanish-American ports is to seek the consent of the representative of the country to which the vessel belongs." (Letter of November 18, 1890.) In the conclusion of the same letter Mr. Blaine, in speaking of the Government, says: "On more than one occasion it has permitted its legations and ships of war to offer hospitality to political refugees. This it has done from motives of humanity. Its views would not have been less pronounced if, in addition to the humane aspects of the subject, it had also been confronted with the duty of preventing the decks of its merchant vessels from being made the theater of illegal violence, upon groundless and unlawful excuses and without the pretense of legal formality.

"For your course, therefore, in intervening to permit the authorities of Guatemala to accomplish their desire to capture General Barrundia I can discover no justification."

The criticism of Mr. Mizner's action seems to have been based, therefore, upon his course "in intervening to permit the authorities of Guatemala to accomplish their desire to capture General Barrundia." The precedents cited in the long letter of Mr. Blaine do not all bear upon this point, however.

Later, on December 30, 1893, Mr. Gresham, as shown above, arrives at the conclusion that "right of asylum has no application to merchant vessels; masters, as well as diplomatic and consular officers, can neither assist in nor resist the orderly operation of the law of the port."

Changes in the Navy Regulations.—The United States Navy Regulations themselves show to some degree the change in attitude since the Barrundia case. The provisions of the Regulations issued in 1893 are very

different in their tenor from those which have been issued since that time. There has been a marked limitation in the statements in regard to asylum. This may be taken as an indication of a change of attitude on the part of the Government. It is certainly sufficient evidence for the determination of the line of action for a naval officer of the United States.

The clauses relating to asylum are here printed. The difference between the clauses of 1893 and the clause of 1896 is such as to place the whole matter on a very different basis. There is but slight difference in the wording of the clauses of 1896 and 1900. The word "local" is omitted in the issue of 1900.

The clause as issued in 1900 most nearly accords with current opinion, as shown by writers upon international law:

Article 287, U. S. Navy Regulations, 1893.

1. In reference to granting of asylum, in the territorial waters of a foreign state, the ships of the United States shall not be made a refuge for criminals.

2. In the case of persons other than criminals they shall be afforded shelter whenever it may be needed, to United States citizens first of all, and to others, including political refugees, as the claims of humanity may require and the service upon which the ships are engaged will permit.

3. The obligation to receive political refugees and to afford them an asylum is in general one of pure humanity. It should not be continued beyond the urgent necessities of the situation, and should in no case become the means whereby the plans of contending factions or their leaders are facilitated. The captain of a ship of the Navy is not to invite or encourage such refugees to come on board his ship, but should they apply to him his action shall be governed by considerations of humanity and the exigencies of the service upon which he is engaged.

4. When a political refugee has embarked, in the territory of a third power, on board a merchant vessel of the United States as a passenger for purposes of innocent transit, and it appears upon the entry of such vessel into the territorial waters that his life is in danger, it is the duty of the captain of a ship of the Navy present to extend to him an offer of asylum.

Article 288, U. S. Navy Regulations, 1896.

The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, local usage sanctions the granting of asylum; but even in the waters of such countries officers should refuse all applications for asylum except when required by the

interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum.

Article 308, U. S. Navy Regulations, 1900.

The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum; but even in the waters of such countries officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum.

Article 308 of the United States Navy Regulations, which prescribes the duties of officers in regard to granting asylum, does not sanction any direct or indirect invitation to refugees to accept asylum.

The Government may of course permit, as Mr. Blaine says, its ships of war "to offer hospitality to political refugees," but without such authorization the naval officer is at present forbidden to make such offer.

In other cases where the matter of asylum is in question he is in general to remain passive.

The position taken in the Naval War College Manual of International Law seems to be the one most favored at present. In speaking of a political refugee, the Manual says: "When, instead of preserving the asylum and refuge gained by reaching a foreign country, he deliberately exposes himself to arrest and punishment by entering the territorial waters of the country in which he is considered an offender, he has no claim to the protection of any other State," (p. 30).

Conclusion.—From the above discussion it is evident that in judging of the action of State X the commander should seek to know:

(1) Whether the arrest was made in due form, so far as the exigiencies of the disturbed condition of State X permitted.

(2) Whether any treaty provisions between the United States and State X touched upon the case of Mr. Smith.

(3) Whether the trial for the offense, if permitted under the treaty and not otherwise prohibited, would be fairly conducted.

To this extent Mr. Smith is entitled to the good offices of the official representatives of the United States Government.

Beyond this it is a general principle that representatives of the United States in a foreign harbor "can neither assist in nor resist the orderly operation of the law of the port."

(b) *The question of intervention for the protection of those involved in insurrection who, after being sent out of the disturbed State, return to its jurisdiction upon a foreign merchant vessel.*

The discussion thus far applies in the main to the general subject of asylum upon merchant vessels.

The situation under consideration involves the particular phase of asylum in a case where a United States citizen who has, after being sent out of State X because of implication in the insurrection, returned upon a merchant vessel to a port within the jurisdiction of State X.

Attitude of the Department of State.—In the following quotation from a letter to the Secretary of the Navy from the Secretary of State, dated July 15, 1899, the position is taken that Americans, having been allowed to leave a foreign country in which they have been implicated in revolution, by returning to that foreign country place themselves beyond the power of intervention of their own government in their behalf:

SIR: I have the honor to acknowledge the receipt of your letter of the 12th ultimo, inclosing a copy of one to you from Lieutenant-Commander Kimball, U. S. Navy, commanding officer of the *Vixen*, at Bluefields, in which he requests general instructions as to the policy of this Government respecting the protection of such American citizens as, having taken part in the recent insurrection at that place, were allowed to leave the country, but who may again return thither and be apprehended and prosecuted by the Nicaraguan authorities.

You request to be advised of the views of this Department on the subject.

In reply, I have the honor to inform you that an instruction, a copy of which is herewith inclosed, was sent to our consul at San Juan del Norte on May 13 last, informing him that Americans who were implicated in that insurrection, and who have returned to Nicaragua, have placed themselves beyond the power of this Government to intervene in their behalf should they be recaptured.

The cases thus foreshadowed do not come under either the Barrundia or the Gomez case referred to by Lieutenant-Commander Kimball. Those persons were natives of the country, in transit, and on board an American ship entering a port of the country without intent to land. The 33 men in question were expelled from Nicaraguan territory, and it is apprehended that they may attempt to reenter Nicaraguan jurisdiction. Many, if not most of them, are understood to be citizens of the United States.

Effort should be made to warn such persons in time of the risk they run in reentering Nicaragua, and, if occasion require, they might be temporarily received on an American vessel before they land and before any process of arrest under due warrant of law be attempted against them. If, however, they actually land, or are arrested by judicial authority on a merchant ship in port before endeavoring to land, the naval commander could not claim their release or delivery to him but would have to limit his action to the exercise of good offices, so far as possible, in conjunction with the consular representatives of the United States, to secure for them fair and open process of law, with every opportunity for defense, and, if convicted, leniency of treatment.

Conclusion.—While from this letter there may be an implication that it applies only to persons who intend to land in the state from which they have been expelled, yet the right to arrest before landing is admitted. It becomes very clear, then, that it is not the province of representatives of the United States Government in foreign ports to interfere to hinder the due process of local judicial procedure.

It is however proper to use good offices to secure fair trial and "leniency of treatment." A naval officer may also receive on board temporarily such persons as Mr. Smith "before any process of arrest under due warrant of law be attempted against them," and "effort should be made to warn such persons of the risk they run in reentering" the state from which they have been sent.

The tendency seems to be toward the limitation of the so-called right of asylum to more narrow limits from year to year, and it may now be said in the language of the Regulations of the United States Navy "the right of asylum for political and other refugees has no foundation in international law."

Its exercise in advanced states is tolerated rarely, and only under very exceptional circumstances, but is somewhat more frequently tolerated in case of disturbed conditions in the less advanced states.

Situation IV.

War exists between the United States and State X. A war vessel of the United States enters a harbor of State Y, a neutral. In the harbor is a supply ship of the United States. The war ship is about to take on coal, oil, etc., from the supply ship, when the authorities of State Y protest against the action as a violation of neutrality and forbid the use of the port for such purposes, claiming that it would be equivalent to allowing the port to be used for the fitting out of an hostile expedition.

(*a*) Is the protest of State Y valid?

(*b*) What should the commander do?

(*c*) Would the case be different provided there was a fleet of war vessels of the United States with supply ships instead of the two vessels above mentioned?

SOLUTION.

(*a*) The protest of State Y is valid, as State Y has full right to regulate the conditions of entrance and sojourn of war vessels in her ports.

(*b*) The commander should heed the protest as valid.

(*c*) The presence of a fleet of war vessels with supply ships would make it necessary for State Y to use greater care to see that there should be no violation of neutrality.

NOTES ON SITUATION IV.

Jurisdiction over public vessels.—(*a*) The matter of treatment of belligerent war vessels in neutral ports in time of war has received much attention. There has been a tendency toward uniformity in modern practice.

The question of jurisdiction of a foreign neutral state over a war vessel of a belligerent has been quite fully set forth in the opinion rendered by Chief Justice Marshall in the case of the *Exchange* v. *M'Faddon*. This case has been frequently cited as setting forth the fundamental principles of jurisdiction and as showing that the jurisdiction of a state can be limited only by self-imposed restriction, and, further, that the state is itself the

exclusive judge of the nature of those restrictions. Yet the determination of the limits of this jurisdiction is to be in accord with the general principles set forth in the practice of the law of nations. This opinion is worthy of a somewhat full presentation:

Marshall's opinion.—The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction, but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion growing out of that usage.

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

The full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of the complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.

First. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory. * * *

Second. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers. * * *

Third. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions. * * *

But the rule which is applicable to armies does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country and the dangers often, indeed generally, attending it do not ensue from admitting a ship of war without special license into a friendly port. A different rule, therefore, with respect to this species of military force has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports, be closed against vessels of war generally or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them, while allowed to remain, under the protection of the government of the place.

In almost every instance the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license thus granted any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible that they enter by his assent; and if they enter by his assent, necessarily implied, no just reason is perceived by the court for distinguishing their case from that of vessels which enter by express assent.

In all cases of exemption which have been reviewed much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged but which the court will not attempt to evade.

Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade, who can not thereby claim any exemption from the jurisdiction of

the country. It may be contended, certainly with much plausibility, if not correctness, that the same rule and same principle are applicable to public and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded that a private vessel, really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act of forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress which would not be demanded for or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur and ought not to be prejudged.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted that the whole reasoning upon which such exemption has been implied in other cases applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it can not be reasonably presumed that his sovereign means to subject him to the authority of a prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this can not be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the court it appears that where, without treaty, the ports of the nation are open to the public and private ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading vessels and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceeding reasoning has maintained the propositions that all exemptions from territorial jurisdictions must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied its extent must be regulated by the nature of the case and the views under which the parties requiring and conceding it must be supposed to act.

After mentioning the treatment of private ships, Mr. Chief Justice Marshall further says:

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of her sovereign; is employed by him in national objects. He has many and powerful motives for preventing those motives from being defeated by the interference of a foreign state. Such interference can not take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port may reasonably be construed, and it seems to the court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception. * * *

It seems, then, to the court, to be a principle of public law that national ships of war entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction. (U. S Supreme Court Reports, 7 Cranch, 116, *Exchange* v. *M'Faddon.*)

Later opinions of the court.—This opinion of Chief Justice Marshall has been most widely and approvingly quoted as showing the fundamental grounds for the exemption of war vessels of one state from the jurisdiction of another state even when in the ports of the second state.

The Supreme Court has also frequently referred to this opinion.

In a subsequent case (*The Santissima Trinidad*, 7 Wheaton, 283) the United States Supreme Court says:

In the case of the *Exchange* (7 Cranch, 116) the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law and in a friendly manner, shall be exempt from the local jurisdiction. But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offense, and if afterwards such public ships come into our ports they

are amenable to our laws in the same manner as other vessels. To be sure, a foreign sovereign can not be compelled to appear in our courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits.

If, however, he comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way and under the same circumstances as the ships of his nation. But there is nothing in the law of nations which forbids a foreign sovereign, either on account of the dignity of his station, or the nature of his prerogative, from voluntarily becoming a party to a suit in the tribunals of another country, or from asserting there any personal, or proprietary, or sovereign rights, which may be properly recognized and enforced by such tribunals. It is a mere matter of his own good will and pleasure; and if he happens to hold a private domain within another territory, it may be that he can not obtain full redress for any injury to it, except through the instrumentality of its courts of justice. It may therefore be justly laid down as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction of himself or his courts; and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations and to regulate their intercourse in a manner best suited to their dignity and rights. It would indeed be strange if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon those who seek an asylum in our ports. (U. S. Supreme Court Reports, 7 Wheaton, 283, p. 473.)

Proclamation, 1870.—The proclamation by President Grant on October 8, 1870, gives a very full statement of belligerent rights in neutral ports.

By the President of the United States of America.

A PROCLAMATION

Regulating the conduct of vessels of war of either belligerent in the waters within the territorial jurisdiction of the United States.

Whereas on the 22d day of August, 1870, my proclamation was issued, enjoining neutrality in the present war between France and the North German Confederation and its allies and declaring, so far as then seemed to be necessary, the respective rights and obligations of the belligerent parties and of the citizens of the United States; and

Whereas subsequent information gives reason to apprehend that armed cruisers of the belligerents may be tempted to abuse the hospitality accorded to them in the ports, harbors, roadsteads, and other waters of the United States, by making such waters subservient to the purposes of war:

Now, therefore, I, Ulysses S. Grant, President of the United States of America, do hereby proclaim and declare that any frequenting and use of

the waters within the territorial jurisdiction of the United States by the armed vessels of either belligerent, whether public ships or privateers, for the purpose of preparing for hostile operations, or as posts of observation upon the ships of war or privateers or merchant vessels of the other belligerent lying within or being about to enter the jurisdiction of the United States, must be regarded as unfriendly and offensive and in violation of that neutrality which it is the determination of this Government to observe; and to the end that the hazard and inconvenience of such apprehended practices may be avoided, I further proclaim and declare that, from and after the 12th day of October instant, and during the continuance of the present hostilities between France and the North German Confederation and its allies, no ship of war or privateer of either belligerent shall be permitted to make use of any port, harbor, roadstead, or other waters within the jurisdiction of the United States as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities of warlike equipment; and no ship of war or privateer of either belligerent shall be permitted to sail out of or leave any port, harbor, or roadstead or waters subject to the jurisdiction of the United States from which a vessel of the other belligerent (whether the same shall be a ship of war, a privateer, or a merchant ship) shall have previously departed, until after the expiration of at least twenty-four hours from the departure of such last-mentioned vessel beyond the jurisdiction of the United States.

If any ship of war or privateer of either belligerent shall, after the time this notification takes effect, enter any port, harbor, roadstead, or waters of the United States, such vessel shall be required to depart and to put to sea within twenty-four hours after her entrance into such port, harbor, roadstead, or waters, except in case of stress of weather or of her requiring provisions or things necessary for the subsistence of her crew, or for repairs; in either of which cases the authorities of the port or of the nearest port (as the case may be) shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been permitted to remain within the waters of the United States for the purpose of repair shall continue within such port, harbor, roadstead, or waters for a longer period than twenty-four hours after her necessary repair shall have been completed, unless within such twenty-four hours a vessel, whether ship of war, privateer, or merchant ship of the other belligerent, shall have departed therefrom, in which case the time limited for the departure of such ship of war or privateer shall be extended so far as may be necessary to secure an interval of not less than twenty-four hours between such departure, and that of any ship of war, privateer, or merchant ship of the other belligerent which may have previously quit the same port, harbor, roadstead, or waters.

No ship of war or privateer of either belligerent shall be detained in any port, harbor, roadstead, or waters of the United States more than twenty-four hours, by reason of the successive departures from such port, harbor, roadstead, or waters, of more than one vessel of the other belligerent. But if there be several vessels of each or either of the two belligerents in the same

port, harbor, roadstead, or waters, the order of their departure therefrom shall be so arranged as to afford the opportunity of leaving alternately to the vessels of the respective belligerents, and to cause the least detention consistent with the objects of this proclamation. No ship of war or privateer of either belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States, to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without sail power, to the nearest European port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam power, then with half the quantity of coal which she would be entitled to receive if dependent upon steam alone; and no coal shall be again supplied to any such ship of war or privateer in the same or any other port, harbor, roadstead, or waters of the United States, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship of war, or privateer shall, since last thus supplied, have entered a European port of the government to which she belongs.

In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this 8th day of October, in the year of our Lord 1870, and of the independence of the United States of America the ninety-fifth.

[SEAL.] U. S. GRANT.

By the President:

HAMILTON FISH,

Secretary of State.

(Foreign Relations U. S. 1870, p. 48.)

Domestic law.—The position of the Government of the United States, so far as domestic law is concerned, is set forth in the following statute:

SEC. 5285. Every person who, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, curiser, or other armed vessel which, at the time of her arrival within the United States, was a ship of war or cruiser or armed vessel in the service of any foreign prince or state or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state or of any colony, district, or people with whom the United States are at peace, by adding to the number of the guns of such vessel or by changing those on board of her for guns of a larger caliber or by adding thereto any equipment solely applicable to war, shall be deemed guilty of a high misdemeanor and shall be fined not more than one thousand dollars and be imprisoned not more than one year.

(U. S. Revised Statutes.)

British regulations.—The British regulations show the position of a great maritime power toward the control of the general conduct of war vessels in a foreign port by the authorities of that port.

Queen's Regulations and Admiralty Instructions, 1899, provide for Great Britain as follows:

592. Subject to any limit which the neutral authorities may place upon the number of belligerent cruisers to be admitted to any one of their ports at the same time, the captain, by the comity of nations, may enter a neutral port with his ship for the purpose of taking shelter from the enemy or from the weather or for obtaining provisions or repairs that may be pressingly necessary.

593. He is bound to submit to any regulations which the local authorities may make respecting the place of anchorage, the limitation of the length of stay in the port, the interval after a hostile cruiser has left the port before his ship may leave in pursuit, etc.

594. He must abstain from any acts of hostility toward the subjects, cruisers, vessels, or other property of the enemy which he may find in the neutral port.

595. He must also abstain from increasing the number of his guns, from procuring military stores, and from augmenting his crew even by the enrollment of British subjects.

Thus it is seen that the decision of the courts, proclamations, domestic laws, and regulations alike agree upon the growing tendency to prescribe more and more definitely the exact range of action which may be permitted to a belligerent war vessel in a neutral port. In no case is there a doubt that the neutral state has a right to make regulations upon this subject. The proclamations of neutrality issued in recent wars also show a tendency to become explicit in outlining belligerent rights in neutral ports. This has been particularly the case since the civil war in the United States and the adjustment of the Alabama claims.

Neutrality proclamations.—The neutrality proclamations issued by various governments during the Spanish-American war of 1898 show the tendency toward specific restriction of belligerent action so far as it affects neutrals. The proclamations issued during the Russo-Japanese war in 1904 are even more specific in many instances than those issued in 1898.

The British neutrality proclamation of April 23, 1898, following the treaty of May 8, 1871, provides that—

A neutral government is bound—

* * * * *

Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men.

The circular letter from the foreign office of February 10, 1904, gives the full and latest statement of the British position upon this subject:

RULE 3. No ship of war of either belligerent shall hereafter be permitted, while in any such port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, to take in any supplies, except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel to the nearest port of her own country or to some nearer named neutral destination, and no coal shall again be supplied to any such ship of war in the same or in any other port, roadstead, or waters subject to the territorial jurisdiction of Her Majesty, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters as aforesaid. (The London Gazette Extraordinary, February 11, 1904.)

Articles IX and X of the decree of April 6, 1864, revised in 1895, provided that for Italy—

In no case can a belligerent ship make use of an Italian port for purpose of warfare or to supply itself with arms or ammunition. It can not, under pretext of repairs, execute works in any way adapted to increase its warlike force.

Nothing shall be supplied to belligerent ships of war or cruisers excepting provisions, commodities, and things for repairs simply necessary for their crews and the safety of their voyage. Such belligerent ships of war or cruisers as wish to resupply themselves with coal shall not receive that supply until twenty-four hours after their arrival.

The mercantile marine code of Italy also makes provision on this matter:

ART. 248. In no case can a belligerent ship make use of an Italian port for war purposes or to provision itself with arms or munitions. No work can be executed under the pretext of repairs which in any way could add to the fighting strength of the vessel.

The circular letter of the Brazilian ministry of foreign affairs of April 29, 1898, is even more explicit in its terms

upon the subject of supplying belligerent vessels in its ports. Section XII of this letter reads:

It will not be permitted to either of the belligerents to receive in the ports of the Republic goods coming directly for them in the ships of any nation whatever.

This means that the belligerents may not seek ports en route and on account of an unforeseen necessity while having the intention of remaining in the vicinity of the coasts of Brazil, taking thus beforehand the necessary precautions to furnish themselves with the means of continuing their enterprises. The tolerance of such an abuse would be equivalent to allowing our ports to serve as a base of operation for the belligerents.

The Netherlands proclamation of neutrality in the Russo-Japanese war, issued in February, 1904, enters even more into details in prescribing the treatment of belligerent ships in its port than was the case at the time of the Spanish-American war of 1898. This may be in part due to the nearness of some of its colonial possessions to the seat of hostilities.

Such provisions as the following occur:

ARTICLE IV. It is prohibited within the Kingdom to provide ammunition or arms to war ships or either of the belligerent parties to assist them in any way toward the increase of their men, arms, or equipment and to the making of repairs, as also toward the providing of the material or implements necessary thereto.

The same prohibition is made in regard to every vessel that is evidently destined for the direct conveyance to a war ship of either of the belligerent parties of the assistance or goods above mentioned in the first clause.

ARTICLE V. It is prohibited without the previous sanction thereto from the proper authority to afford within the territory of the Kingdom to any war ship of the belligerent parties provisions or fuel.

Rights of vessels in port.—From various points of view it is evident that belligerent war vessels in neutral ports in time of war have, aside from the customary right of entrance in case of stress of weather or other absolute necessity, no rights beyond such as the neutral state may concede.

Entrance for purposes having no bearing upon the conduct of hostilities is generally conceded to war vessels. This is, however, in most instances now denied to privateers and to armed vessels with prizes and to vessels captured as prize.

Risley says:

A neutral government must prevent its ports from being used as a base of operations and supplies by the ships of either belligerent.

In time of war, as in time of peace, public vessels may freely enter a foreign port in the absence of prohibition by the state to whom the port belongs. But if a neutral power chooses to close its ports to the public vessels of both belligerents, the latter can only enter under stress of weather or in case of absolute necessity. This practice has been already adopted by many states with reference to one class of belligerent public vessels, namely, prizes taken from the enemy, and it is possible that, having regard to the strict impartiality expected from neutrals, it may be eventually extended to belligerent public vessels of every kind. The British regulations of 1862, described below, go far in this direction. At present, however, the rule is that, in the absence of prohibition, a belligerent man-of-war may enter a neutral port and make such repairs and take in such coal and provisions as may be necessary to enable it to navigate safely. Hospitality is lawful, but anything over and above this, amounting to an augmentation of force, is not. To permit a belligerent ship of war to receive such an illegal augmentation of force is a breach of neutrality and vitiates all captures subsequently made by the ship which has received it. (See La Santissima Trinidad, footnote, p. 197.)

Owing to the very modern development of steam, international law does not as yet contain an authoritative rule as to the purchase of coal by a belligerent in neutral ports. During the American civil war Great Britain allowed ships of war to take in only so much coal in British ports as would suffice to carry them to the nearest port of their own country, and refused any second supply to the same vessel, without special permission, until after the expiration of three months.

These regulations enable a belligerent ship to navigate safely without adding to its fighting power and prevent it from making the neutral port a base of operations by coaling there at frequent intervals.

The United States adopted similar regulations during the Franco-Prussian war, and the usage of the two countries is not unlikely to become general in the future. (J. S. Risley, Law of War, p. 205.)

Lawrence (Principles of International Law, page 503) says:

The rule of abstention from active hostility in neutral waters or on neutral land has received in comparatively recent times an obvious and reasonable extension. It is now the duty of belligerents—

To abstain from making on neutral territory direct preparations for acts of hostility.

Warlike expeditions may not be fitted out within neutral borders, nor may neutral land or waters be made the base of operations against an enemy. The fighting forces of a belligerent may not be reinforced or recruited in neutral territory, and supplies of arms and warlike stores or other equipments of direct use for war may not be obtained therein. But these prohibitions do not extend to remote uses and the supplies and equip-

ments that are useful for such purposes as sustaining life or carrying on navigation. Provisions may be purchased by belligerent ships lying in neutral ports, and they may take on board masts, spars, and cordage, and even undergo repairs, but nothing beyond what is necessary to make them seaworthy must be done to them. Any structural changes that increase their efficiency as instruments of attack and defense are strictly forbidden, as well as any augmentation of their warlike force.

A neutral state may, if it chooses, restrict the amount of innocent supplies allowed to belligerent ships who take advantage of the hospitality of its ports and waters, and a usage is springing up of permitting such vessels to take on board only a limited quantity of coal. A distinction must, however, be drawn between prohibitions which depend entirely upon the will of the neutral and prohibitions which are imposed by international law. The former can be made or unmade, strengthened or relaxed at pleasure, and as long as they are reasonable in themselves and applied with absolute impartiality to both sides in the struggle no power has any reason to complain. The latter are fixed and constant, and if a belligerent ignores them or a neutral suffers them to be ignored the aggrieved parties, whether neutral or belligerent, can demand reparation and take means to prevent a repetition of the offense.

We have seen that a belligerent is bound not to use neutral territory as a base of operations or as a convenient place for the organization of warlike expeditions which may proceed from thence to attack the enemy or prey upon his commerce.

But it is impossible to understand the nature and extent of these obligations without an examination of the exact sense to be attached to the two phrases, "base of operations" and "warlike expedition." The former is a technical term of the military art, and was introduced into international law when the growing sense of state duty rendered it necessary to define with accuracy the limits of belligerent liberty and neutral forbearance. It is to be found in the second of the three rules of the treaty of Washington of 1871, but the Geneva arbitrators did not attempt to explain it in their award. Hall quotes from Jomini, the great French writer on the art of war, a definition of a base of operations as a place or station "from which an army draws its resources and reinforcements, that from which it sets forth on an offensive expedition, and in which it finds a refuge at need." He goes on to contend that "continued use is above all things the crucial test of a base," and it is difficult to resist the arguments in favor of this view, which applies to a fleet or a single ship as well as to an army or a detachment of troops. The drawing of supplies once or twice from a given point in the course of long-continued hostilities will not make it into a base.

The general position may be said to be well established. With changed conditions, more definite rules are necessary.

Even during the American civil war ships of war were only permitted to be furnished with so much coal in English ports as might be sufficient to take them to the nearest port of their own country, and were not allowed to

receive a second supply in the same or any other port, without special permission, until after the expiration of three months from the date of receiving such coal. The regulations of the United States in 1870 were similar, no second supply being permitted for three months unless the vessel requesting it had put into a European port in the interval.

There can be little doubt that no neutral states would now venture to fall below this measure of care; and there can be as little doubt that their conduct will be as right as it will be prudent. When vessels were at the mercy of the winds it was not possible to measure with accuracy the supplies which might be furnished to them, and as blockades were seldom continuously effective, and the nations which carried on distant naval operations were all provided with colonies, questions could hardly spring from the use of foreign possessions as a source of supplies. Under the altered conditions of warfare matters are changed. When supplies can be meted out in accordance with the necessities of the case, to permit more to be obtained than can, in a reasonably liberal sense of the word, be called necessary for reaching a place of safety is to provide the belligerent with means of aggressive action, and consequently to violate the essential principles of neutrality. (Hall, International Law, 5th ed., p. 106.)

Woolsey says:

The same spirit of humanity, as well as respect for a friendly power, imposes on neutrals the duty of opening their ports to armed vessels of both belligerents for purposes having no direct relation to the war and equally likely to exist in the time of peace. Cruisers may sail into neutral harbors for any of the purposes for which merchant vessels of either party frequent the same places, except that merchant vessels are suffered to take military stores on board, which is forbidden generally, and ought to be forbidden, to ships of war. (International Law, section 167.)

Conclusions.—The rapid changes in the means and methods of conducting maritime hostilities has made necessary the development of new regulations in regard to the treatment of belligerent vessels in neutral ports. These regulations will naturally change with further development in means and methods of warfare.

It may be safely said that belligerent vessels in neutral ports in time of war can scarcely be said to have rights, but only such privileges as the neutral state may grant, which are generally of entrance for purposes which are not warlike in character, in intent, or in effect.

In other words, the neutral state must maintain its neutrality, even though it grants belligerent war vessels certain privileges within its ports.

Kleen clearly presents the case:

Il appartient à tout État souverain de décider lui-même dans quelle mesure il veut permettre aux étrangers l'usage de ses ports et rades, comme de ses eaux territoriales en général; et ce droit de décision est indépendant du but et de la nature de l'emploi. Juridiquement, un navire de guerre ne peut pas exiger plus d'hospitalité pour ses visites d'exercice, qu'un navire de commerce pour son trafic, un pleasure-yacht pour ses excursions. La seule priorité juridique des navires de guerre consiste dans leur exterritorialité, l'accès une fois admis. Mais quant à l'accès lui-même, ils n'y ont pas plus de droit que d'autres navires; et ils sont soumis, autant que ceux-ci, au devoir d'obéir à l'ordre prescrit par le souverain et les autorités des lieux.

Un état de guerre n'apporte en général à l'application de cette règle pas d'autres modifications que celles qui découlent des devoirs d'un État neutre, particulièrement de son devoir de faire valoir son inviolabilité territoriale contre les abus éventuels de l'hospitalité commis par les belligérants en vue de renforts ou d'autres buts de guerre, et de protéger contre toute hostilité tant les belligérants eux-mêmes que d'autres étrangers admis soit à l'asile soit à l'accès simple, l'expérience ayant démontré combien la présence de navires de guerre des belligérents en port neutre peut devenir dangereuse à ces deux égards. Mais, à ces restrictions apportées par le devoir, pour garantir la neutralité de l'État et les droits de chacun, le souverain du territoire est naturellement libre d'ajouter les ordonnances qu'il lui plaît et qu'il trouve convenables, pour sauvegarder l'ordre chez lui, en considérant, par exemple, sa situation géographique, les circonstances spécialement difficiles, des intérêts particuliers etc.,—bien entendu sans favoriser ou défavoriser l'une des parties belligérantes comme telle plus que l'autre. (La Neutralité, I, p. 530.)

Halleck's International Law, Baker's ed., II, p. 166, maintains that,

Moreover, the extent of a nation's sovereign rights depends, in some measure, upon its municipal laws, and other powers are bound not only to abstain from violating such laws, but to respect the policy of them. The municipal laws of a state for the protection of the integrity of its soil and the sanctity of its neutrality are sometimes more stringent than the general laws of war. The right of a sovereign state to impose such restrictions and prohibitions, consistent with the general policy of neutrality, as it may see fit is undeniable. And all acts of the officers of a belligerent power against the municipal law of a neutral state or in violation of its policy involve that government in responsibility for their conduct.

In the situation as proposed, State Y, a neutral, has protested against the taking of coal, oil, etc., by a war vessel of the United States, a belligerent, from one of its supply vessels lying in the neutral port of State Y. State Y claims that to permit such an act would be equivalent to allowing the port to be used as a place for fitting out a hostile expedition.

From the nature of the supply ship, a United States vessel, State Y would not care to exercise any jurisdiction over it beyond the ordinary port jurisdiction.

The intent of the sending of such a vessel is with a view of fitting out the war vessel for more effective and extended service. Naturally, as the neutral state could not determine the amount or kind of supplies which the war vessel might take from the supply ship, it could not guard its neutrality. To allow this action to proceed would be much like transforming its port into a coaling station, at which the war vessel might take on supplies even with more safety than at one of its own ports, as it would be under the protection of the neutrality of the port and not liable to attack from the enemy. Such a transfer of supplies would not be a commercial transaction, but an actual part of the military operations of the United States.

To permit such action would be equivalent to allowing the port to be used as a base for military operations.

The neutrality regulations of Brazil in 1898 distinctly stated, "It will not be permitted to either of the belligerents to receive in the ports of the Republic goods coming directly for them in the ships of any nation whatever."

This position of Brazil goes a step further than the case under consideration, as this involves receiving supplies from a United States supply ship, while the Brazilian regulation forbids such action in case of "ships of any nation whatever."

(*a*) The protest of State Y is valid and fully justified; indeed to maintain her neutrality State Y must use due diligence to prevent such action.

(*b*) Owing to the reasons as set forth already, the commander must conform to the just demands of the authorities of State Y.

(*c*) The only difference in case there was a fleet of war vessels with supply ships in the port would be one of degree. The evidence of an intent to use the port of Y as a base for hostile operations would be more clear even, and the duty of State Y would be more plain.

Situation V.

While war exists between the United States and State X a number of the war vessels of State X are pursued by a United States fleet and seek refuge in a port of State Y, a neutral. The commander of the United States fleet, after waiting outside the port for twenty-four hours, protests to the authorities of State Y, claiming that as the vessels of the enemy have entered the neutral port to escape his fleet they may not justly be sheltered longer.

(*a*) Is the position taken by the United States commander correct?

(*b*) What should the authorities of State Y do?

SOLUTION.

(*a*) The United States commander would be justified in requesting that belligerent vessels entering and remaining in the neutral port solely in order to escape capture by his fleet be interned for the remaining period of the war.

(*b*) The authorities of State Y would be acting in accord with the best opinion in granting his request.

NOTES ON SITUATION V.

The twenty-four hour rule.—(*a*) The commander of the United States fleet waits twenty-four hours before entering his protest, probably on the ground that a belligerent war vessel is usually allowed twenty-four hours sojourn in a neutral port.

Upon this practice, however, there is considerable difference of opinion, some writers considering it to have the force of law, others regarding it as in effect only when so proclaimed.

Text writers' opinions.—Risley, discussing sojourn of a belligerent ship in a neutral port, says:

> There is on principle no reason for limiting the stay of a belligerent ship in a neutral port, provided of course that she receives no augmenta-

tion of force there; but in the event of a ship belonging to the other belligerent appearing at the same port, restrictions become necessary in order to prevent a collision in neutral waters.

In 1759 Spain laid down the rule that the first of two vessels of war belonging to different belligerents to leave one of her ports should not be followed by the other until the expiration of twenty-four hours. At first this rule was only imposed upon privateers, the word of a captain of a ship of war that he would not commit hostilities being sufficient; but it has now been extended to all ships of war by most of the great states, including Great Britain, France, and the United States.

The "twenty-four hours rule," as it is called, is not, however, sufficient of itself to prevent abuse of neutral ports. In 1861 the United States ship *Tuscarora* took advantage of the rule to practically blockade the Confederate cruiser *Nashville* in Southampton Water. The *Tuscarora* contrived always to start before the *Nashville*, when the latter attempted to sail, and returned before the twenty-four hours—during which the *Nashville* had to stay behind—had expired. A similar case occurred during 1862 at Gibraltar, where the Confederate ship *Sumter* was practically blockaded, at first by the *Tuscarora*, and afterwards by the *Ino* and *Kearsarge*. This blockade was terminated by the sale of the *Sumter* to a British subject, and her subsequent escape to England. She was ultimately wrecked in attempting to run the blockade of Charleston. Accordingly, in 1862 Great Britain laid down the rule that war vessels of either belligerent must not remain in British ports for more than twenty-four hours, except under stress of weather, or in order to effect necessary repairs, in either of which cases the ship must put to sea as soon as possible after the expiration of the twenty-four hours.

During the Franco-Prussian war this rule was again adopted by Great Britain, and also by the United States, and, taken in conjunction with the old "twenty-four hours rule," seems likely to be accepted in the future for the regulation of the hospitality accorded to belligerent cruisers in neutral ports. But it can never be a hard-and-fast rule of International Law, because, as Hall well observes, "the right of the neutral to vary his own port regulations can never be ousted. The rule can never be more than one to the enforcement of which a belligerent may trust in the absence of notice to the contrary." (J. S. Risley, The Law of War, p. 206.)

Lawrence gives considerable attention to the subject but does not regard the rule as fixed:

We will consider next the duty of belligerent states to obey all reasonable regulations made by neutral states for the protection of their neutrality.

This duty relates chiefly, though not exclusively, to maritime affairs. The land forces of the combatants are not permitted to enter neutral territory, but unless a neutral expressly forbids the entry of belligerent war ships, they may freely enjoy the hospitality of its ports and waters. Permission is assumed in the absence of any notice to the contrary, but nevertheless it is a privilege based upon the consent of the neutral, and therefore capable of being accompanied by any conditions he chooses to

impose. Belligerent commanders can demand that they shall not be asked to submit to unjust and unreasonable restraints, and that whatever rules are made shall be enforced impartially on both sides. But further they can not go. Where they enter on sufferance they must respect the wishes of those who permit their presence. Only when their vessels are driven by stress of weather, or otherwise reduced to an unseaworthy condition, can they demand admission as a matter of strict law. Their right to shelter under such circumstances is called the right of asylum, and it can not be refused by a neutral without a breach of international duty.

In recent times neutral states have acted upon their right of imposing conditions upon belligerent vessels visiting their ports. The twenty-four hour rule is the oldest and the most common. It lays down that when war vessels of opposing belligerents are in a neutral ports at the same time, or when war vessels of one side and merchant vessels of the other are in the like predicament, at least twenty-four hours shall elapse between the departure of those who leave first and the departure of their opponents. The object of this injunction is to prevent the occurrence of any fighting, either in the waters of the neutral or so close to them as to be dangerous to vessels frequenting them. Sometimes the word of the commanders that they will not commence hostilities in or near neutral territorial waters has been accepted as sufficient. Greater precautions were generally taken for the restraint of privateers; but the practical abolition of privateering by the Declaration of Paris has made obsolete the distinction between two classes of belligerent cruisers. The possibility of evading the twenty-four hours rule was shown by the conduct of the United States steamer *Tuscarora* at Southampton in December, 1861, and January, 1862. The southern cruiser *Nashville* was undergoing repairs in the harbor, and by keeping steam up, claiming to precede her whenever she attempted to depart, and then returning within a day, the *Tuscarora* really blockaded her in a British port. In the end a British ship of war, exercising a right which a neutral possesses in extreme cases, escorted the *Nashville* past the *Tuscarora* and out to sea, while the latter was forbidden to leave the port for twenty-four hours. This and other circumstances caused the British Government to issue, on January 31, 1862, a series of neutrality regulations more stringent than any hitherto published. They provided that no ship of war of either belligerent should be permitted to leave a British port from which a ship of war or merchant vessel of the other belligerent had previously departed, until after the expiration of at least twenty-four hours from the departure of the latter. They laid down further that war vessels of either belligerent should be required to depart within twenty-four hours of their entry, unless they needed more time for taking in innocent supplies or effecting lawful repairs, in which case they were to obtain special permission to remain for a longer period, and were to put to sea within twenty-four hours after the reason for their remaining ceased. They might freely purchase provisions and other things necessary for the subsistence of their crews; but the amount of coal they were allowed to receive was limited to as much as was necessary to take them to the nearest port of their country.

Moreover, no two supplies of coal were to be obtained in British waters within three months of each other. These restrictions upon the liberty of belligerent vessels in British ports have been reimposed in subsequent wars. The United States adopted them in 1870 at the outbreak of the conflict between France and Germany, and other powers have copied them wholly or in part. In fact, they have become so common that they are sometimes regarded as rules of International Law. This is especially the case with regard to the supply of coal. It is often said that a neutral state is bound to allow belligerent cruisers to take on board no more than is sufficient to carry them to the nearest port of their own country. Such an obligation is unknown to the law of nations, which arms neutrality with authority to impose what restraint they deem necessary, but does not condemn them if they impose none. (Lawrence, Principles of International Law, p. 509.)

Hall regards the twenty-four rule as "practically sure to be enforced in every war:"

Marine warfare so far differs from warfare on land that the forces of a belligerent may enter neutral territory without being under stress from their enemy. Partly as a consequence of the habit of freely admitting foreign public ships of war belonging to friendly powers to the ports of a state as a matter of courtesy, partly because of the inevitable conditions of navigation, it is not the custom to apply the same rigor of precaution to naval as to military forces. A vessel of war may enter and stay in a neutral harbor without special reasons; she is not disarmed on taking refuge after defeat; she may obtain such repair as will enable her to continue her voyage in safety; she may take in such provisions as the needs; and if a steamer, she may fill up with enough coal to enable her to reach the nearest port of her own country; nor is there anything to prevent her from enjoying the security of neutral waters for so long as may seem good to her. To disable a vessel, or to render her permanently immovable, is to assist her enemy; to put her in a condition to undertake offensive operations is to aid her country in its war. The principle is obvious; its application is susceptible of much variation; and in the treatment of ships, as in all other matters in which the neutral holds his delicate scale between two belligerents, a tendency toward the enforcement of a harsher rule becomes more defined with each successive war.

It is easy to fix the proper means of repairs; difficulties short of such circumstances as those which have already been discussed may sometimes occur with reference to supplies of coal or provisions; but if a belligerent can leave a port at his will, the neutral territory may become at any time a mere trap for an enemy of inferior strength. Accordingly, during a considerable period, though not very generally or continuously, neutral states have taken more or less precaution against the danger of their waters being so used. Perhaps the usual custom until lately may be stated as having been that the commander of a vessel of war was required to give his word not to commit hostilities against any vessel issuing from a neutral shortly before him, and that a privateer as being less responsible person, was subjected to detention for twenty-four hours. The disfavor however, with

which privateers have long been regarded has not infrequently led to their entire exclusion, save in cases of danger from the sea or of absolute necessity; and the twenty-four hours rule has been extended to public ships of war by Italy, France, England, the United States, and Holland. Probably it may now be looked upon as a regulation which is practically sure to be enforced in every war. (Hall, International Law, 5th ed., p. 626.)

Hall also points out that the earlier view of the twenty-four hour rule was not sufficient to cover the cases which may easily arise, and that a limit to the time of sojourn should be made more definite. This position taken by Hall is emphasized by the differentiation in modern war vessels in respect to speed and seaworthiness.

On the general subject of the twenty-four hour rule Hall says:

It will probably be found necessary to supplement the twenty-four hours rule by imposing some limit to the time during which belligerent vessels may remain in a neutral port when not actually receiving repairs. The insufficiency of the twenty-four hours rule, taken by itself, is illustrated by an incident which occurred during the American civil war. In the end of 1861, the United States corvette *Tuscarora* arrived in Southampton waters with the object, as it ultimately appeared, of preventing the exit of the Confederate cruiser *Nashville*, which was then in dock. By keeping up steam and having slips on her cable, so that the moment the *Nashville* moved the *Tuscarora* could precede her, and claim priority of sailing, by moving and returning again within twenty-four hours and by notifying and then postponing her own departure, the latter vessel attempted and for some time was able to blockade the *Nashville* within British waters.

In order to guard against the repetition of such acts, it was ordered in the following January that during the continuance of hostilities any vessel of war of either belligerent entering an English port "should be required to depart and to put to sea within twenty-four hours after her entrance into such port, except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew, or repairs;" in either of which cases the authorities of the port were ordered "to require her to put to sea as soon as possible after the expiration of such period of twenty-four hours." In 1870 [and in 1898] the same rule was laid down; and the United States, unwilling to allow the others the license which she permitted to herself, adopted an identical resolution. It is perhaps not unlikely soon to become general. (Hall, International Law, 5th ed., p. 628.)

With these opinions continental writers in the main concur, some asserting it even more strongly than the British writers cited.

It is evident that while the twenty-four hour rule can not be held to be obligatory upon a neutral at the present

time in the absence of the neutral's own declaration to that effect, it is nevertheless in a high degree incumbent upon a neutral State to enforce the rule.

The technical correctness of the action of the commander in waiting twenty-four hours may be admitted, provided that it is granted that belligerent vessels may seek a neutral port in order to escape capture or defeat at the hands of the enemy.

Twenty-four hour rule in proclamations.—The proclamations of neutrality of the various States at the time of the Spanish-American war show the current of opinion.

The regulation of Great Britain, which in spirit serves as a model to a large number of others, is as follows upon this point:

GREAT BRITAIN.

RULE 2. If there is now in any such port, roadstead, or waters subject to the territorial jurisdiction of the British Crown any ship of war of either belligerent, such ship of war shall leave such port, roadstead, or waters within such time (not less than twenty-four hours) as shall be reasonable, having regard to all the circumstances and the condition of such ship as to repairs, provisions, or things necessary for the subsistence of her crew; and if after the date hereof any ship of war of either belligerent shall enter any such port, roadstead, or waters subject to the territorial jurisdiction of the British Crown, such ship shall depart and put to sea within twenty-four hours after her entrance into any such port, roadstead, or waters, except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew, or repairs, in either of which cases the authorities of the port, or of the nearest port (as the case may be), shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be nesessary for her immediate use; and no such vessel which may have been allowed to remain within British waters for the purpose of repair shall continue in any such port, roadstead, or waters for a longer period than twenty-four hours after her necessary repairs shall have been completed. Provided, nevertheless, that in all cases in which there shall be any vessels (whether ships of war or merchant ships) of both the said belligerent parties in the same port, roadstead, or waters within the territorial jurisdiction of Her Majesty, there shall be an interval of not less than twenty-four hours between the departure therefrom of any such vessel (whether a ship of war or merchant ship) of the one belligerent, and the subsequent departure therefrom of any ship of war of the other belligerent; and the time hereby limited for the departure of such ships of war respectively shall always, in case of necessity, be extended so far as may be requisite for giving effect to this proviso, but no further or otherwise.

(The same communication is sent by Lord Lansdowne to the Lords Commissioners of the Admiralty, etc., February 10, 1904.)

The British regulation would make it obligatory for a belligerent vessel to depart at the end of the twenty-four hour period, unless, on account of necessary repairs, provisions, stress of weather, or presence in port of a ship of the other belligerent.

The colonial regulations are in some instances more detailed.

China in the main follows Great Britain, though requiring the officials in charge of the port to compel the vessel to leave at the expiration of the period.

CHINA.

(2) After issuance of this proclamation, should any war ship of either belligerent come into a Chinese port, except on account of heavy winds or storms, or to obtain food for crews or for repairs, it must not remain over twenty-four hours, and the officials in charge of the port or waterway must, at the end of twenty-four hours, compel said boat to leave, and must not permit the loading of more provisions than are actually needed by the crew. In case of repairs, the ship must leave within twenty-four hours after repairs are completed. No delay must be premitted. War or merchant ships, of whichever nation, in a Chinese port, must be separated in leaving by twenty-four hours' time, and must not leave before or remain longer than said time.

The proclamation of Japan is more general, as is the Netherlands proclamation and the Dutch West Indies regulations:

JAPAN.

2. No man-of-war or other ship belonging to one or the other of the belligerent powers shall be permitted to commit any act of war or visit, search, or capture merchantmen within the territorial waters of the Empire. Neither shall such man-of-war or such other ship be allowed to make use of any portion of the territorial waters of the Empire as the basis or headquarters of naval operations or for any warlike purposes whatever.

3. The men-of-war and other ships used for warlike purposes, belonging to one or the other of the belligerent powers, may enter any of the ports that are open to ships for ordinary purposes of navigation, but should not stay in the waters of such port longer than twenty-four hours. In case when such men-of-war or such other ships used for warlike purposes have been compelled to seek the waters of such port on account of unavoidable circumstances, such as stress of weather, destitution of articles necessary for

navigation, or disablement, and are unable to quit the port within twenty-four hours, they should leave the territorial waters of the Empire as soon as such circumstance or circumstances shall have ceased to exist.

NETHERLANDS.

ARTICLE I. The vessels and ships of war of the parties at war shall be admitted to the Kingdom's sea channels, mentioned in article 1 of the royal order of February 2, 1893 (Official Gazette, No. 46), with due observance of the further provisions of that order, for a sojourn not exceeding twenty-four hours, unless it is absolutely necessary that a longer sojourn be granted them, either for the procuring of provender or coal or in case of distress or dangers of the sea.

DUTCH WEST INDIES.

ARTICLE I. Ships and vessels of war of the belligerents will be admitted to the harbors and roadsteads of the colony for a stay of twenty-four hours at most, unless it is shown to be necessary to grant them a longer stay to enable them to provide themselves with provisions or coal, or in cases of distress or in dangers of the sea. In such cases, however, they must depart as soon as they have finished taking in provisions or coal, within the first twenty-four hours, if possible; otherwise, as quickly as practicable, as soon as the danger is past, and in the case of repairs within twenty-four hours at the furthest after the repairs have been finished. The period of twenty-four hours at the utmost fixed for the stay in port shall be exceeded only when necessary to the execution of the provisions of article 5 of this publication. Such quantity of provisions may be taken on board as is sufficient for the subsistence of the crew, but the supply of coal must not be more than sufficient to enable the ship or vessel to reach the nearest port of the country to which it belongs or that of one of its allies in the war. The same vessel shall not be supplied a second time with coal until at least three months have elapsed since the former supply, unless special permission be granted to that effect.

The Italian regulation is concise and definite.

ITALY.

ART. VII. No belligerent ship of war or cruiser can remain more than twenty-four hours in a port or roadstead, or on the coasts of the Kingdom, or in the adjacent waters, even when it comes there alone, except in case of arrival under stress on account of bad weather, of damages, or want of the necessary provisions for the safety of the voyage.

For Russia a longer delay than twenty-four hours requires special Imperial authorization.

RUSSIA.

The Imperial Government further declares that the ships of war of two belligerent powers may only enter Russian ports for twenty-four hours. In case of stress of weather, absence of goods or provisions necessary to

the maintenance of the crew, or for indispensable repairs, the prolongation of the above-mentioned time can only be accorded by special authorization of the Imperial Government.

The proclamation of Brazil, one of the fullest in its provisions, makes definite reference to the refuge from the enemy.

BRAZIL.

No war ship or privateer shall be permitted to enter and remain with prizes in our ports or bays during more than twenty-four hours, except in case of a forced putting into port, and in no manner shall it be permitted to it to dispose of its prizes or of articles coming out of them.

By the words "except in case of a forced putting into port" should also be understood that a ship shall not be required to leave port within the said time:

First. If it shall not have been able to make the preparations indispensable to enable it to go to sea without risk of being lost.

Second. If there should be the same risk on account of bad weather.

Third, and finally, if it shall be menaced by an enemy.

In these cases it shall be for the Government, at its discretion, to determine, in view of the circumstances, the time within which the ship should leave.

Conclusion.—It may be said in regard to the protest of the commander that he is in the main justified in making a protest against a sojourn of longer than twenty-four hours on the part of the war vessel of State X unless the sojourn be on the grounds of special necessity and not for military reasons. In this position the opinions of writers and the general drift of neutrality proclamations agree.

Internment.—(*b*) The question next arising is in regard to the proper course of action of State Y, a neutral, in view of the fact that the belligerent vessels of State X have sought her port to escape the capture by the vessels of the United States.

Land forces thus entering neutral territory are interned for the remainder of the war. Some maintain that the same course should be pursued in regard to maritime forces.

Unmanned vessel in neutral port.—The completed torpedo boat *Somers* belonging to the United States was not allowed to leave the British port for military purposes during the Spanish war. The dispatches concerning this boat show that the boat was practically interned.

Mr. Hay to Mr. White.

DEPARTMENT OF STATE,
Washington, November 19, 1898.

SIR: In view of a letter from the Secretary of the Navy, dated the 15th instant, you are instructed to make, if practicable, arrangements with the British Government permitting the bringing to the United States of the torpedo boat *Somers*, now stored at Falmouth, England, giving assurance that in case of the resumption of hostilities with Spain this vessel will not be made use of.

I am, etc., JOHN HAY.

Mr. White to Mr. Hay.

AMERICAN EMBASSY,
London, December 10, 1898.

SIR: Referring to your instruction 959, of the 19th ultimo, I have the honor to inform you that upon the day of its receipt I called at the foreign office and had an interview with Mr. Assistant Under Secretary Villiers, through whom I requested Her Majesty's Government to allow the torpedo boat *Somers* to leave Falmouth, on the understanding that in the event of a renewal of hostilities between ourselves and Spain she should not be made use of.

I subsequently addressed a note, of which I inclose a copy, to the Marquis of Salisbury on the subject, and you will observe from his lordship's reply, which is also transmitted herewith, that our request has been granted.

I yesterday communicated this fact to you by a telegram, whereof I inclose a copy.

I have, etc., HENRY WHITE.

Mr. White to Lord Salisbury.

AMERICAN EMBASSY,
London, December 1, 1898.

MY LORD: I have the honor, in accordance with instructions from the Secretary of State, to invite the good offices of your lordship with a view to obtaining the consent of Her Majesty's Government to the departure from Falmouth, where she has been stored since the outbreak of the war, of the United States torpedo boat *Somers*.

I am instructed, in making this request, to give assurance to your lordship, in behalf of my Government, that in case hostilities should unfortunately be resumed with Spain, which would now appear to be highly improbable, the *Somers* will not be made use of, and I venture to hope that, upon this understanding, Her Majesty's Government may see their way to allow her to leave for the United States.

I have, etc., HENRY WHITE.

Lord Salisbury to Mr. White.

FOREIGN OFFICE, *December 8, 1898.*

SIR: I have the honor to acknowledge the receipt of your note of the 1st instant, in which you invite my good offices with a view of obtaining the consent of Her Majesty's Government to the departure from Falmouth, where she has been stored since the outbreak of the war, of the United States torpedo boat *Somers*. You add that you are instructed by the United States Government to give an assurance that in the event of hostilities being resumed with Spain, which would now appear to be highly improbable, the *Somers* will not be made use of.

In view of this assurance I have the honor to state that Her Majesty's Government are glad to comply with your request, and that the necessary instructions will at once be sent to the proper authorities in order to facilitate the departure of the vessel.

I have, etc., F. H. VILLIERS,

(For the Marquis of Salisbury.)

(United States Foreign Relations, 1898, p. 1006.)

Asylum to vessels pursued by enemy.—Galiani (Dei doveri dei principi neutrali, I, cap. X, §4) maintains that asylum can be afforded to a ship pursued into neutral waters by an enemy only on condition that it practically be interned for the remainder of the war.

Gessner opposes this position of Galiani (Le Droit des neutres, p. 78). Perels follows Gessner, maintaining that even in a case where entrance to neutral waters is forbidden to a belligerent ship the position of Galiani is not justifiable, because the prohibition ought to hold only against voluntary and not against forced entrance. (Seerecht, section 39, II, a.)

Fiore (Droit International, III, p. 476) maintains that it seems that there should be a difference made between ships of war of the belligerents which are forced by the elements to make an entrance and those which seek the port as a refuge to escape pursuit by a victorious enemy about to capture or to sink them. In the first case, according to the usages of international law, the neutral state ought not to disarm the ship nor to prevent it from again taking part in the hostilities; but the second case is altogether exceptional, since the victor may be deprived of his prey through the protection afforded. This is without question an act of humanity, but if the belligerent can not continue his attack upon his opponent

in territorial waters, he should not be allowed to obtain safety and after making repairs to return to the combat. The refugee would thus obtain the protection of the neutral not only to escape the superior victorious force, but also to put himself again in condition for battle. Following this line of reasoning, Fiore concludes that the duties of humanity should be reconciled with the exigencies of war by preventing the belligerent ship from taking further part in the war, by retaining it in port, after disarming, or by allowing it to depart only after obtaining the word of the commander not to take any part during the remainder of the war.

The question of asylum to belligerent vessels in time of war in neutral ports was fully considered by the Institute of International Law in 1898. The report of the Institute recognized the difference between forces upon the sea and those upon land, due to natural conditions, which made it impossible to obtain supplies, fuel, repairs, etc., with the same facility as upon land, and also recognized the special dangers from the natural elements, as from stress of weather. The Institute in its discussions recognized the propriety of admitting belligerent vessels to neutral ports in time of war upon such grounds as might be regarded broadly as grounds of humanity. An admission to neutral ports under such conditions, for such specific purposes, limiting supplies, etc., to those absolutely necessary, and the duration of sojourn to period likewise absolutely necessary, would be no violation of neutrality, nor would it make the neutral port a base of military operations. It was held that such action of the neutral was not military in its nature and did not necessarily affect the issue of the conflict or modify the relations of the belligerent.

On the other hand, the admission to a neutral port of a belligerent ship pursued by its opponent and unable or even unwilling to meet its pursuer is to put the pursued ship beyond the reach of the other belligerent even more effectively than might have been the case had she entered one of her home ports. Such action may directly influ-

ence the issue of the war. Yet, in the first place it is admittedly impossible for the neutral in every instance to prevent the entrance of a vessel thus pursued, and in the second place the neutral may not allow any combat within neutral jurisdiction.

If the neutral allows the belligerent vessel fleeing from its opponent to find refuge in its neutral port for a time and then to go forth to meet the enemy, the neutral in effect makes the port a base of operations. The fleeing belligerent may in many instances within the twenty-four hour period summon and receive such reenforcement that when she again goes forth she may join with other of the forces of State X sufficient to secure her own safety or to threaten the force of the United States. In many other ways the twenty-four hour sojourn may be a decided or even a decisive military advantage. It is evident in this situation that the vessel of State X entered the port of Y from overwhelming military reasons. The vessel entered to escape capture or destruction by the enemy. To afford shelter under such circumstances and to allow the vessel to again set forth from the neutral port upon a military expedition is to act as an ally of State X.

In order that the neutral may not violate neutrality and in order that the pursuing belligerent may not be deprived of some of the rewards of his effort to place his enemy beyond the power of further contest, there seems to be a single line of approved conduct, viz, to intern the belligerent vessel coming within neutral jurisdiction in order to escape capture by a pursuing enemy.

Kleen, in La Neutralité, 1898, Volume I, on page 533, says:

> Donc, un naivre de guerre *fuyant* devant l'ennemi et réfugié dans un port neutre, y est traité à l'instar des fuyards de la guerre continentale, c'est-à-dire désarmé et interné après avoir joui des soins humanitaires; tandis qu'au contraire, le naivre entré en *disette* ou détresse proprement dite peut et doit quitter le port et mettre au large aussitôt qu'il est hors de danger.

Opinion of the Institute of International Law.—Kleen was also instrumental in drawing up the rules adopted by the

Institute of International Law in 1898. These were unanimously adopted, as follows:

(*Annuaire de l'Institut de Droit International, XVII, 1898, Session de la Haye, page 285.*)

Art. 42 La concession d'asile aux belligérants dans les ports neutres, tout en dépendant de la décision de l'État souverain du port et ne pouvant être exigée, est presumée, à moins de notification contraire préalablement communiquée.

Toutefois, quant aux navires de guerre, elle doit être limitée aux cas de véritable détresse, par suite de: (1°) Défaite, maladie ou équipage insuffisant, (2°) péril de mer, (3°) manque des moyens d'existence ou de locomotion (eau, charbon, vivres), (4°) besoin de réparation.

Un navire bélligérant se réfugiant dans un port neutre devant la poursuite de l'énnemi, ou après avoir été défait par lui, ou faute d'équipage pour tenir la mer, doit y rester jusqu'à la fin de la guerre. Il en est de même s'il y transporte des malades ou des blessés, et qu'après les avoir débarqués, il soit en état de combattre. Les malades et les blésses, tout en étant reçus et secourus, sont, après guérison, internés également, à moins d'être reconnus impropres au service militaire.

Un refuge contre un péril de mer n'est donné aux navires de guerre des belligérants que pour la durée du danger. On ne leur fournit de l'eau, du charbon, des vivres et autres approvisionnements analogues qu'en la quantité nécessaire pour atteindre le port national le plus proche. Les réparations ne sont permis que dans la mesure nécessaire pour que le bâtiment puisse tenir la mer. Immédiatement après, le navire doit quitter le port et les eaux neutres.

Si deux navires ennemis sont prêts à sortir d'un port neutre simultanément, l'autorité locale établit, entre leurs appareillage, un intervalle suffisant de vingt-quatre heures au moins. Le droit de sortir le premier appartient au navire le premier entré, ou, s'il ne veut pas en user, à l'autre, a la charge d'en réclamer l'éxercice à l'autorité locale, qui lui délivre l'autorisation si l'adversaire, dûment avisé, persiste à rester. Si, à la sortie du navire d'un belligérant, un ou plusieurs navires ennemis sont signalés, le navire sortant doit être averti et peut être réadmis dans le port pour y attendre l'entrée ou la disparition des autres. Il est défendu d'aller à la rencontre d'un navire ennemi dans le port ou les eaux neutres.

Les navires des bélligerants doivent, en port neutre, se conduire pacifiquement, obéir aux ordres des autorités, s'abstenir de toutes hostilités, de toute prise de renfort et de tout recrutement militaire, de tout espionnage et de tout emploi du port comme base d'opération.

Les autorités neutres font respecter, au besoin par la force, les prescriptions de cet article.

L'État neutre peut exiger une indemnité de l'État belligérant dont il a entretenu soit des forces légalement internées, soit des malades et blessés, ou dont les navires ont, pas mégarde ou par infraction à l'ordre du port, occasionné des frais ou dommage.

Internment in Russo-Japanese War.—On August 10, 1904, the *Czarevitch*, a Russian battle ship, accompanied by destroyers, pursued by a Japanese fleet, sought shelter in the port of Tsingtau, and the German authorities interned the vessels. Certain other Russian vessels were interned at British ports in which they sought shelter. The Russian transport *Lena* received like treatment by the United States at San Francisco.

Conclusion.—(*a*) From the point of view of both theory and practice it would seem that the United States commander, under the circumstances as stated in the situation, would be justified in claiming that belligerent vessels entering and remaining in the neutral port in order to escape capture by his vessels, should be interned for the remaining period of the war.

(*b*) The authorities of State Y would also be under obligations to intern the vessels of State X thus seeking neutral protection.

Situation VI.

(*a*) During the war between the United States and State X a commander of a United States war vessel enters a port of State Y, a neutral, and sends a cipher message to the regular telegraph office for transmission to his home government. Under orders from the authorities of State Y the message is refused at the office. The commander protests.

(*b*) The commander then sends an openly worded message, which is also refused unless the authorities are permitted to reword the message without materially changing its apparent meaning. The authorities also claim the right to refuse to transmit any portions of the message which they deem fit, provided they give notice to the commander that such portions will not be transmitted. The commander again protests against all these claims.

How far is the position of State Y correct in each case?

SOLUTION.

(*a*) The position of neutral State Y in refusing to allow the transmission of the telegram in cipher is correct. It is entirely proper for a neutral state to forbid such use of a line or cable.

(*b*) State Y has full right to prohibit the transmission of any or all such messages. The authorities of State Y would have no right to mutilate a dispatch already accepted for transmission, but could prescribe such restrictions as seemed necessary in regard to the form in which messages should be accepted.

NOTES ON SITUATION VI.

(*a*) *Right to control the telegraph.*—The first situation involves the right of a neutral to prohibit the sending of cipher messages by a belligerent from a neutral point to his home government.

In this case, as stated, the message is submitted in cipher by the commander of a United States war vessel for transmission to his home government.

The inference would without reasonable question be that such message would be military in its nature, because sent by a military commander to his home government, and further because embodied in cipher.

The situation then further reduces to that of the right of a neutral to regulate or control the sending of official military dispatches from points within his territory to a belligerent government.

The general right of control of the telegraphic communication by a government has been repeatedly claimed and exercised by various governments, particularly in case of such lines as pass from one state to another. In general this control extends to the right to demand priority in the transmission of government dispatches or to absolute control in case of necessity.

The character of the act would be the same should the message be submitted for transmission as in the situation given whether the line of transmission were by land or submarine telegraph. The possibilities of interruption of the transmission by the other belligerent would, however, be very different in the two cases.

Control by the United States.—The right of control of cables has been asserted in very definite form by the United States. A somewhat full discussion elsewhere presented before this Naval War College indicates that—

> The right to legislate for this form of property is therefore in the power of the state, or in case no legislation has been enacted the legal control is in the proper department of the Government. This position was affirmed by Secretary Fish as early as July 10, 1869, as follows:
>
> "It is not doubted by this Government that the complete control of the whole subject, both of the permission and the regulation of foreign intercourse, is with the Government of the United States, and that however suitable certain legislation on the part of a State of the Union may become, in respect to proprietary rights in aid of such enterprises, the entire question of allowance or prohibition of such means of foreign intercourse, commercial or political, and of the terms and the conditions of its allowance, is under the control of the Government of the United States." (Wilson, Submarine Telegraphic Cables in their International Relations, p. 10.)

President Grant took practically the same position in his message of December, 1875, and since that time the position has often been reaffirmed. All foreign sub-

marine cables having a terminus in the United States have been landed under a distinct condition that the "Executive permission is to be accepted and understood by the company as being subject to any future action of Congress in relation to the whole subject of submarine telegraphy." A late opinion of the Attorney-General, in accordance with which the President was entitled to act and to order all the departments of executive character to act, sums up the matter as follows:

The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President. * * * The President has charge of our relations with foreign powers. It is his duty to see that in the exchange of comities among nations we get as much as we give. He ought not to stand by and permit a cable to land on our shores under concessions from a foreign power which does not permit our cables to land on its shores and enjoy there facilities equal to those accorded its cable here. * * * The President is not only the head of the diplomatic service, but commander in chief of the Army and Navy. A submarine cable is of inestimable service to the Government in communicating with its officers in the diplomatic and consular service, and in the Army and Navy when abroad. The President should therefore demand that the Government have precedence in the use of the line, and this was done by President Grant in the third point of his message. * * * The Executive permission to land a cable is of course subject to subsequent Congressional action. The President's authority to control the landing of a foreign cable does not flow from his right to permit it in the sense of granting a franchise, but from his power to prohibit it should he deem it an encroachment on our rights or prejudicial to our interests. The unconditional landing of a foreign cable might be both, and therefore to be prohibited, but a landing under judicious restrictions and conditions might be neither, and therefore to be permitted in the promotion of international intercourse. (22 Opins. Atty. Gen., p. 25.)

Hongkong-Manila cable in 1898.—Certain correspondence carried on during the Spanish-American war of 1898 shows that a new cable between a point occupied by a belligerent and a neutral point could not properly be laid in time of war without laying the neutral open to the suspicion of violation of neutrality.

Mr. Hay to Mr. Day.

AMERICAN EMBASSY,
London, May 11, 1898.

The Marquis of Tweeddale, president of Hongkong and Manila Telegraph, informs me that they hold their concessions from Spanish Government,

on condition that they shall not send telegrams when forbidden by Spain. This formal order has been given by Spain. They are therefore compelled to cease working for the present. He professed friendly feelings and desire that we should establish ourselves permanently in Philippine Islands, but declared inability to act otherwise in view of his concessions.

HAY.

Mr. Day to Mr. Hay.

DEPARTMENT OF STATE,
Washington, May 22, 1898.

Spanish control by special franchise cable from Manila to Hongkong. Admiral Dewey has possession of the end of the cable at Manila, but can not control end at Hongkong. British ambassador has telegraphed British minister for foreign affairs for permission to land new cable at Hongkong, to be constructed by American company; he also advises British minister for foreign affairs that you will see him on the subject. See him at once and ascertain if concession can be had for American company.

DAY.

Mr. Day to Mr. Hay.

DEPARTMENT OF STATE,
Washington, May 31, 1898.

SIR: I have received your telegram of the 26th instant, which, deciphered, reads as follows:

British minister for foreign affairs is taking opinion of the law officers of the Crown regarding Manila cable. Answer not yet received, but I have reason to think it will be negative. Concessions regarded as violation of neutrality.

Respectfully, yours, WILLIAM R. DAY.

Mr. Hay to Mr. Day.

AMERICAN EMBASSY,
London, June 1, 1898.

British Government regret not at liberty to comply with our request to land cable at Hongkong.

HAY.

Mr. Hay to Mr. Day.

AMERICAN EMBASSY,
London, June 1, 1898.

SIR: Referring to my dispatch No. 407, of the 24th of May, and to my cabled dispatch of the 26th of May, I now have the honor to transmit a copy of a note just received from the Marquis of Salisbury, in which he informs me

that he has consulted the lord chancellor and the attorney and the solicitor general in regard to our request that landing facilities at Hongkong should be granted to an American cable from Manila, and expresses his regret that as he is advised by Her Majesty's Government is not at liberty to comply with the proposal of the Government of the United States.

As you will have learned by my cable dispatch, I had anticipated this decision. My conversation with high diplomatic and legal authorities had convinced me that they could not authorize us to land a cable at Hongkong without a breach of neutrality.

I am, etc., JOHN HAY.

Lord Salisbury to Mr. Hay.

FOREIGN OFFICE, *May 27, 1898.*

YOUR EXCELLENCY: You expressed to me on Monday last the desire of the United States Government that a cable should be laid from Manila to Hongkong, and requested that Her Majesty's Government would grant landing facilities at Hongkong for that purpose. You informed me that the United States Government has been desirous of employing the agency of the Eastern Telegraph Company for the conveyance of their messages, but that the company had been compelled to refuse their application by an intimation from the Spanish Government that the concessions of the company would be forfeited if they assented to it. I have consulted the lord chancellor and the attorney and solicitor general in respect to your excellency's communication, and regret to inform you that, as I am advised, Her Majesty's Government is not at liberty to comply with the proposal of the Government of the United States.

I have, etc., SALISBURY.

(Foreign Relations U. S., 1898, p. 976.)

If consent by the neutral in time of war to the laying of a new cable between belligerent and neutral territory would be regarded as contrary to neutrality, the use for warlike purposes of one already laid would be open to question.

Carriage of military dispatches.—It may be said that the general character of the telegraphic service must be such as to give the neutral some reasonable ground for refusing to receive the dispatch in question or any other dispatch for transmission.

There has been much discussion in regard to the carriage of military dispatches by neutral ships, and it is generally held an act which renders the ship liable to penalty.

Speaking of the general subject of carriage of dispatches by neutral ships Hall says:

> Despatches not being necessarily noxious, a neutral carrier is not necessarily exposed to a penalty for having made a specific bargain to carry them. He renders himself liable to it only when there is reasonable ground for belief that he is aware of their connection with purposes of war. As the bearer of letters can not be assumed to be acquainted with their contents, the broad external fact of their destination is taken as the test of their character, and consequently as the main ground for fixing him with or exonerating him from responsibility. Two classes of despatches are in this manner distinctly marked. Those which are sent from accredited diplomatic or consular agents residing in a neutral country to their government at home, or inversely, are not presumably written with a belligerent object, the proper function of such agents being to keep up relations between their own and the neutral state. The despatches are themselves exempt from seizure, on the ground that their transmission is as important in the interests of the neutral as of the belligerent country; and to carry them therefore is an innocent act. Those on the other hand which are addressed to persons in the military service of the belligerent, or to his unaccredited agents in a neutral state, may be presumed to have reference to the war, and the neutral is bound to act on the presumption. If therefore they are found, when discovered in his custody, to be written with a belligerent purpose, it is not open to him to plead ignorance of their precise contents; he is exonerated by nothing less than ignorance of the fact that they are in his possession or of the quality of the person to whom they are addressed. (Hall, International Law, 5th ed., p. 675.)

The service rendered by the means of the telegraph may be vastly more important for the issue of the war than any service through the transmission of dispatches by ships or messengers. The element of time, so vital in military operations, is practically eliminated by the use of the telegraph in communication.

In the general operations of war the present network of cable and telegraph lines furnishes, if allowed to be used freely for military purposes, means of information far more effective than any system of scouts in making known hostile movements and in anticipating the enemy.

Use of cables during Spanish-American war of 1898.—The cables from neutral points during the Spanish-American war in 1898 both furnished information and transmitted military dispatches to the United States, indeed the cables did much in the way of furnishing information which the scouting vessels were unable to obtain. The

telegraph also furnished the general information in regard to movements of the forces.

There were but few instances in which any objection was offered by neutral authorities to entire freedom of use of cable and telegraph lines.

That the consular and other representatives will be expected to take advantage of telegraphic communication for warlike purposes is evident from such instructions as were issued by the United States in 1898:

DEPARTMENT OF STATE,
Washington, April 15, 1898.

To the consular officers of the United States:

GENTLEMEN: You are hereby instructed to keep a sharp lookout for the arrival and departure of Spanish war ships or other suspicious vessels that may possibly be fitting out as privateers, and to telegraph at once to the Department full information in the matter when in your discretion it seems of sufficient importance. In the case of suspected privateers you will also inform the diplomatic representative of the United States, if there be one in your country, in order that he can make proper representations to the Government, with a view of preventing the vessel's departure, if possible.

If there be no diplomatic representative in the country where you are stationed or if you be in a colonial dependency, like representations should at once be made through the consul-general, if there be one, or if not, by you directly to the local authority. You will also be alert to catch anything that will be of interest or value in case hostilities begin, and keep the Department fully advised.

All consuls will be expected to remain at their posts during the continuance of the present conditions, and leaves of absence will only be granted in very exceptional cases and for reasons of the greatest urgency.

Respectfully, yours,

WILLIAM R. DAY,
Assistant Secretary.

(Foreign Relations, U. S., 1898, p. 1169.)

Attitude of foreign governments.—Apparently, as telegraphic communication was not closed, the sending of telegrams in regard to the war was not regarded as the use of a port "for any warlike purpose."

The government notice issued from the office of the colonial secretary in Jamaica, April 23, 1898, regarding the Spanish-American war states that—

During the continuance of the present state of war, all ships of war of either belligerent are prohibited from making use of any port or roadstead in the United Kingdom, the Isle of Man, or the Channel Islands, or in any of

Her Majesty's colonies or foreign possessions or dependencies, or of any waters subject to the territorial jurisdiction of the British Crown, as a station or place of resort for any warlike purpose, or for the purpose of obtaining any facilities for warlike equipment.

The Spanish Red Book of 1898, containing the diplomatic negotiations of that State during the Spanish-American war, contains many references to the matter of regulation of telegraphic communication, particularly by means of submarine cables. The Spanish authorities demanded that the use of the cable between Mole St. Nicholas and Santiago be suspended so soon as Santiago should be occupied by American troops. The company claimed that it could not do otherwise than affirm that its continued action was under *vis major* (communications No. 59 and 65). Other protests were entered in regard to the use of cables touching neutral points, but few definite conclusions were reached.

It is evident that the general opinion in 1898 was that messages in regard to the war could be received and transmitted from neutral points in the absence of express prohibition. The representative of one of the belligerents was forbidden to telegraph the arrival of the *Oregon* at the Barbadoes. The authorities, however, learning that the representative of the other belligerent had informed his Government of the arrival, allowed like privileges to both.

At other points telegrams were subjected to delay. In other cases more specific action was taken.

Portugal took definite action to secure the telegraphic service of that country against violation of neutrality in 1898 by discontinuing a portion of the service. The following is the announcement

DIRECTION OF THE TELEGRAPHIC AND POSTAL SERVICES,
DEPARTMENT OF TELEGRAPHS.

It is announced by superior order that at the semaphoric stations on the Continent, the Azores, and Madeira the telegraphic sea-notice service has been discontinued (to which reference is made in articles 274, 275, 276, 277, and 278 of the regulations relative to telegraphic correspondence of December 10, 1892) as regards that portion of it which relates to the appearance, entrance, and departure of war vessels of all nationalities; but the other semaphoric services mentioned in articles 265 to 273 of the said regulations,

and in articles 62 and 63 of the international telegraphic regulations (Budapest revision), will be continued.

Direction of the telegraphic and postal services, April 27, 1898.

For the director-general of posts and telegraphs.

ALFREDO PEREIRA.

(Foreign Relations of U. S., 1898, p. 895.)

The Publication for the Danish West India Islands in the Spanish-American war of 1898 says:

Furthermore, dispatches from or to any of the governmental authorities of any of the belligerent powers are liable to be considered as contraband of war, which it is forbidden to carry.

If it is forbidden to carry such dispatches on board neutral ships, it might be even more reasonable to prohibit their transmission by the more expeditious means of the telegraph; for the neutral alone can guard against the transmission of hostile dispatches by telegraph except so far as submarine or other lines are liable to interruption by the belligerents. The belligerent can not guard against such action as effectively as in transportation of dispatches by ship.

Les particuliers, ressortissant à un État neutre, qui expédient de la contrebande de guerre, le font à l'insu de leur gouvernement, et celui-ci ne peut être responsable d'actes qu'il a ignorés. La situation n'est plus la même quand il s'agit de l'emploi des câbles. Dans la plupart des pays, le télégraphe constitue un service public et chaque État, en concédant le droit d'atterrissement à des Compagnies privées, leur impose des obligations spéciales, notamment celle de ne pouvoir transmettre de correspondances que par l'intermédiaire de ses bureaux. L'État, auquel les articles 7 et 8 de la convention de Saint-Pétersbourg accordent un droit de contrôle sur le service international, a donc le devoir de surveiller les télégrammes; il doit s'abstenir de transmettre ou de délivrer les dépêches qui lui paraitraient contraires à l'impartialité qui doit régir ses relations avec les belligérants. En agissant autrement, il donne une aide indirecte à l'un des belligérants et sa conduite justifie des mesures de rigueur contre le câble.

L'État neutre devrait même, pour faire connaître aux particuliers et aux autres États son intention de ne favoriser par ce moyen aucun des belligérants, insérer dans sa déclaration de neutralité des dispositions semblables à celles qui furent édictées par le Brésil en 1898.

(F. Rey in Revue Générale de Droit International Public, 1901, page 737.)

By the fifth section of the neutrality proclamation of Brazil in 1898:

It is prohibited citizens or aliens residing in Brazil to announce by telegraph the departure or near arrival of any ship, merchant or war, of the belligerents, or to give to them any orders, instructions, or warnings, with the purpose of prejudicing the enemy.

This position implies that the telegraph lines can be used only for innocent purposes. It is doubtful, however, whether this prohibition as worded would cover a message sent by the commander of a belligerent war vessel.

The inference would certainly be that a cipher message presented by a naval officer for transmission from a neutral port to his home government would be military in its nature. Even in the absence of statement by the neutral, by proclamation or otherwise, in regard to the use of the telegraph by the belligerents, it would be entirely proper for a neutral to forbid such use as being of the nature of unneutral service which would probably lay the means of the service open to interruption by the other belligerent, and this with just cause.

Conclusion.—The action of the neutral authorities would be correct and justly within their rights. Hence the protest of the commander in the first instance need not be entertained by the neutral.

(b) *Government censorship.*—The refusal of the neutral authorities to allow the transmission of an openly worded message unless allowed to reword the message without materially changing its apparent meaning, and the claim of the neutral authorities to the right to refuse to transmit any portions of the message, provided they give notice to the commander what portions of the message will not be transmitted, is next brought under consideration.

It has been granted that the refusal of the neutral to receive a dispatch apparently military in character and in cipher is clearly within the rights of the neutral.

It is not difficult to understand that an openly worded dispatch apparently innocent upon its face, when read in accordance with a prearranged code, may be in reality a cipher dispatch, and it is against such a contingency that the neutral authorities seem to be guarding. The protest of the commander against the rewording of the

dispatch would be in evident support of the neutral view. Under such circumstances the position of the neutral authorities is clearly within their right.

The refusal to transmit portions of the message raises the question of the right of the authorities to make changes in a message received for transmission from the representative of a state. Such action, without previous notice and consent of the commander, might make changes in the intent of the communication of such nature as to distinctly injure his cause.

As even entry to the neutral port is a privilege and not a right, and as any commercial transaction with those upon the shore is a privilege also, it is entirely within the rights of the neutral to regulate this communication.

Conclusion.—Accordingly, the neutral authorities have full right to prohibit the transmission of any or all messages, and unless the neutral authorities and the commander of the belligerent ship can agree upon the form of the message, the neutral authorities may even absolutely refuse to allow its transmission.

The position of State Y is in all cases correct, though State Y would have no authority to mutilate or change a message already received.

Situation VII.

During the war between the United States and State X, the senior officer of the United States fleet in a certain region discovers that newspaper correspondents are sending messages by wireless telegraphy. He has not authorized the use of the wireless telegraph by the newspaper correspondents, and its use may interfere with his military plans.

(*a*) What treatment should these correspondents receive?

(*b*) Granting that newspaper correspondents will be allowed in the field of operations, what regulations should govern them?

SOLUTION.

(*a*) In the absence of any prohibition the newspaper correspondents are entitled to use such legitimate means as the wireless telegraph for the transmission of news and are entitled to the ordinary treatment given to newspaper correspondents.

(*b*) If newspaper correspondents are allowed within the field of operations, the correspondents and the agencies of transmission of news should be under the absolute control of the commanding officer in that military area.

(For general scope of regulations see p. 115.)

NOTES ON SITUATION VII.

(a) What treatment should the correspondents described in this situation receive?

Russian Declaration, 1904.—During the Russo-Japanese war in 1904, in April, there was issued by Admiral Alexieff a circular in regard to the use of new means of communication by newspaper correspondents. This was particularly aimed at certain neutral press boats which were using wireless telegraph in transmitting news of the war. The circular handed by the Russian diplomatic agents to the foreign offices of various states was reported as follows:

"I am instructed by my Government, in order that there may be no misunderstanding, to inform your excellency

that the lieutenant of His Imperial Majesty in the Far East has just made the following declaration: In case neutral vessels, having on board correspondents who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off Kwangtung, or within the zone of operations of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with such apparatus shall be seized as lawful prizes."

It should be observed that the Russian Government merely informs other governments that Admiral Alexieff has issued this Declaration. The Russian Government does not assert that it proposes permanently to support the position taken by its lieutenant.

The French text of the Declaration was as follows:

Dans le cas où des vapeurs neutres, ayant à bord des correspondants qui communiqueraient à l'ennemi des nouvelles de guerre au moyen d'appareils perfectionnés n'étant pas encore prévus par les conventions existantes—seraient arrêtés auprès de la côte du Kuantoung où dans la zone des opérations de la flotte russe—les correspondants seront envisagés comme espions et les vapeurs, munis d'appareils de télégraphie sans fil—saisis en qualité de prise de guerre.

Treatment of vessels using wireless telegraph.—Considering the provisions of this circular in the reverse order of their statement, the first matter is the treatment of the vessels. The implication is that the equipment with wireless telegraphic outfit by a neutral vessel "within the zone of operations" is sufficient ground for the seizure of the vessel as lawful prize. If this means that the ordinary rules of prize courts hold for such a vessel, it is difficult to understand how an adjudication can be made. If the circular means that such vessels, when actually engaged in communicating information of a military character to the enemy, are guilty of unneutral service and are liable to the penalties consequent upon such service, the provision is clear, for such would be the offense, and the regular penalty would be confiscation of vessel and equipment.

The attempt to bring under the rules of contraband and violation of blockade many forms of action in time of war which have only a remote relation to either has led to confusion, which shows the need of further elucidation

of the principles of unneutral service which involves actual participation by service in behalf of the enemy.

Spies.—The treatment of the correspondents using wireless telegraphy as spies raises further questions.

The treatment of a captured spy is usually summary and extreme, and while article 30 of the Hague Convention respecting the Laws and Customs of War on Land prescribes that "a Spy taken in the act can not be punished without previous trial," yet, the penalty is usually extreme. If, then, the proclamation of the Russian admiral is admitted as in accord with practice, the position of a newspaper correspondent would be exceedingly dangerous when news is communicated to the enemy, since he might become liable to treatment as a spy.

Both Russia and Japan are, however, parties to the above-mentioned convention, which defines the term "spy," in article 29, as follows:

> An individual can only be considered a spy if, acting clandestinely, or on false pretenses, he obtains, or seeks to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.
>
> Thus, soldiers not in disguise, who have penetrated into the zone of operations of a hostile army to obtain information, are not considered as spies. Similarly the following are not considered as spies: Soldiers or civilians, carrying out their mission openly, charged with the delivery of dispatches destined either for their own army or for that of the enemy. To this class belong likewise individuals sent in balloons to deliver dispathes, and generally to maintain communication between the various parts of an army or a territory.

This rule is in accord with general practice, both for land and naval warfare. There is no basis upon which an officer in the military service can set up a new definition. The fact that a news correspondent uses in transmitting communications "improved apparatus not yet provided for by existing conventions" does not constitute him a spy. It is not the means of communication but the nature of the act which determines the status of a spy. The nature of the act is clearly set forth in the Hague Convention above quoted, and any person, whether newspaper correspondent or other, guilty of such an act, whatever the means used, is a spy without further proclamation or discussion.

Conclusion as to Russian declaration.—The conclusion would be, therefore, that a vessel is not liable to seizure as prize merely from the fact of having on board "improved apparatus" for communicating news, and that correspondents using such "improved apparatus" are not liable from the simple fact of its use to treatment as spies.

On the other hand, newspaper correspondents who act in such manner as to bring themselves under the definition of spies are liable to treatment as such without special notification in the same manner as any other person. The vessel concerned in transmitting such information, together with its equipment for such purpose, is undoubtedly liable to the penalty of unneutral service, which is confiscation.

It is not possible to defend the position assumed in the Russian circular in its present extreme form. As Kebedgy says,

> L'emploi de la télégraphie sans fil par des correspondants de journaux à la guerre a posé une question qui mérite d'être étudiée de près. Mais nous ne pensons pas qu'on pourra jamais approuver la décision de traiter ces correspondants comme des espions. (Revue de Droit International, VI, p. 451.)

The manifest intent of the circular to control the action of press agents and press boats within the zone of hostile operations is, however, proper in view of the danger to the belligerent which may follow unrestricted communications.

Control of newspaper correspondents.—Various regulations have from time to time been issued which affect newspaper correspondents.

The Hague Convention respecting the Laws and Customs on Land, provides:

> ARTICLE XIII. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.

Instructions for the Government of Armies of the United States in the Field prvoide:

> ARTICLE 50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured may be made prisoners of war and be detained as such.

Article 34 of the Brussels Rules of Military Warfare, 1874, provides that—

> Persons in the vicinity of armies, but who do not directly form part of them, such as correspondents, newspaper reporters, vivandiers, contractors, etc., may also be made prisoners of war.
>
> These persons should, however, be furnished with a permit, issued by a competent authority, as well as with a certificate of identity.

and article 23 defines prisoners of war as "lawful and disarmed enemies."

The Oxford Manual of the Laws of War on Land of 1880 gave to such persons a more lenient treatment, as is shown in article 22:

> Persons who follow an army without forming a part of it, such as correspondents of newspapers, sutlers, contractors, etc., on falling into the power of the enemy, can only be detained for so long a time as may be required by military necessity.

The rules of the Hague Convention of 1899 do not define prisoners of war, but do provide for their treatment, and provide that newspaper correspondents and reporters shall have like treatment when captured.

Certification of newspaper correspondents.—The implication of the last clause of Article XIII, viz, "provided they (newspaper correspondents, etc.) can produce a certificate from the military authorities of the army they were accompanying," is that in the future such correspondents are to be regularly certified by the commander of the forces with which they for the time being are.

According to the Hague Convention, the right to grant certificates to correspondents is in the hands of the commander. The commander, in the absence of orders to the contrary, would be authorized to prescribe the regulations under which certificates would be granted and by implication would be able to exclude from the field of his authority those not properly certified.

Further, there is implied in the right to grant the certificate the right to withhold, which would be a means by which the character of the correspondents could be in a measure controlled.

There would also be implied the right to make such rules for the government of correspondents as might at the time seem good.

The rule of the Hague Convention would also seem to indicate that persons not having a proper certificate would not necessarily be entitled to the treatment of a prisoner of war. If this be the case, the military commander would properly insist that correspondents should, if with the forces, be provided with proper certificates.

A plan making a certificate a compulsory prerequisite for accompanying military forces would accord with the spirit of the Hague Convention, and would put the control of correspondents in the hands of the commander of the forces.

The rules of the Hague Convention were drawn with reference to warfare upon land, and have been accepted by practically all the states of the world. The United States authorities would, therefore, be fully justified in demanding that those correspondents only should be allowed with its army who were properly certified.

If it is generally accepted that the military authorities of forces on land should control correspondents, it is even more important that such control should be extended to correspondents in the neighborhood of naval operations, for the disclosure of movements of a fleet or of a war vessel may be even more serious than a similar disclosure in regard to forces upon land.

Right-minded newspaper men ask for fair treatment only and would regard regulations which would give equality of opportunity to all correspondents as in every way desirable; otherwise they would not be fit persons to accompany a military force on sea or land.

The control should not, of course, be limited to the correspondents and reporters alone, but should be extended to the whole personnel and all agencies concerned in gathering and forwarding news of the war.

Such control of the personnel and agencies for gathering and forwarding news could be justly demanded, even the Red Cross personnel and agencies must submit to control of the commanding military authority.

The naval commander has a right to control hospital ships according to the Hague Convention, 1899, for the

Adaptation to Maritime Warfare of the Principles of the Geneva Convention, which provide that hospital ships—

must not in any way hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

The belligerents will have the right to control and visit them; they can refuse to help them, order them off, make them take a certain course, and put a commissioner on board; they can even detain them if important circumstances require it.

As far as possible, the belligerents shall inscribe in the sailing papers of the hospital ships the orders they give them.

The naval commander has full right to demand equal control of correspondents, press boats, dispatch boats, and the like, whose mission may be from its nature far more dangerous than the mission of hospital ships to the success of the military plans.

Regulations somewhat similar in spirit to those for the government of hospital ships and personnel would give to the commander sufficient control without unduly limiting the freedom of action of press boats and press correspondents.

It is on its face far more necessary for a state that its commanders should be unhampered in the prosecution of their military operations in order that they may bring them to a successful issue than that the people of a state should know from hour to hour exactly what the military force is doing. This is what the enemy desires particularly to know.

War is not ordinarily undertaken to give an opportunity for the display of journalistic enterprise, and no commander would be justified in unnecessarily sacrificing resources or men to such enterprise. This being axiomatic, it may also be said that the people are entitled to such knowledge of the course of the war as may not interfere with military operations. The commanding officer in a given area is the best judge as to what information shall be published.

This natural conclusion leads to the further one that the commanding officer must control the news sent from the field of operations. This can be done by the common means of censorship of dispatches and news. This censorship may extend to the entire prohibition of the send-

ing of any dispatches or to the determination of what shall be sent and of the form in which it shall be sent.

From what has been said, it is evident that newspaper correspondents, though using wireless telegraphy, are not therefore spies. If guilty of acts of spying, then they are of course liable to the consequences. The simple sending of messages in regard to the war does not in itself constitute spying. It is an act commercial rather than military in its nature.

After newspaper correspondents have been forbidden within a given area or after they have been notified not to communicate any news in regard to military affairs, the sending of dispatches would constitute an offense with which the commanding officer would have full power to deal.

Conclusion.—Without previous notice in regard to or regulation of the agencies by which newspaper correspondents may send news, it is presumed that all agencies which may not involve perfidy are legitimate. As the correspondents in this instance had not disobeyed any regulation, but had merely, as would be expected, used the most modern means of communication, they are not therefore liable to any penalty. It would be presumed that the agency of the wireless telegraph would be open to them in absence of prohibition and unless forbidden no authorization would be necessary.

The correspondents would therefore be acting in a proper manner and would not be liable to any penalty for the use of the agency of the wireless telegraph when such use is not prohibited.

This conclusion shows the emphatic necessity of the regulation of news gathering and transmission on and from the field of military operations.

(*b*) Granting that newspaper correspondents will be allowed in the field of operations, what regulations should govern them?

Japanese regulations, 1904.—The Regulations for War Correspondents issued by the Japanese Government to hold during the Russo-Japanese war accord with the principles set forth above. These regulations are as following:

REGULATIONS FOR WAR CORRESPONDENTS.

ARTICLE 1. Newspaper correspondents who wish to follow the army are required to make application to the department of war, together with a sketch of their antecedents and a document of personal guaranty signed by the proprietor of the newspaper to which they belong.

In case of foreign correspondents, their application shall be sent through their respective ministers or consuls and the department of foreign affairs.

Foreign correspondents need only mention in their application the name of the newspaper to which they belong and dispense altogether with the presentation of sketches of antecedents and papers of personal guaranty.

ART. 2. The applicant must have been engaged in journalistic work for not less than a year as a member of a newspaper staff.

ART. 3. Foreign correspondents who can not understand the Japanese language may take with them one interpreter each into the field.

Any correspondent requiring an interpreter may engage one himself and present an application on the interpreter's behalf, accompanied by a paper of personal guaranty for the same.

ART. 4. A foreign correspondent, in addition to his interpreter, may engage one or more servants when circumstances demand it, the procedure of engagement to be in accordance with the foregoing article.

ART. 5. The authorities, when they consider it necessary, may cause the selection of one person to act as joint correspondent for several newspapers.

ART. 6. In case any person is allowed to accompany the Japanese forces an official permit shall be given him.

ART. 7. The applicants allowed as stated shall be attached to a "kōtō shireibu" (higher commanding officer).

ART. 8. Correspondents shall always wear foreign clothes, and to their left arms shall be attached a white band, measuring about 2 inches in width, on which the name of the newspaper offices which they represent shall be written in Japanese with red ink.

ART. 9. Correspondents shall always carry with them the official permit, and shall, when asked, show it to officers and officials belonging to the Japanese forces.

ART. 10. Correspondents shall always observe the rules and orders to be issued by the kōtō shireibu so long as they remain with the Japanese forces. In case they disregard the above rules and orders, the authorities of the kōtō shireibu may refuse to allow them to accompany the Japanese forces.

ART. 11. The war correspondent will not be allowed to dispatch his communications (whether they be correspondence for publication or private letters or telegrams, etc.) until after their examination by the officer appointed for the purpose by the higher commanding officer. No communication containing cipher or symbols will be permitted to be dispatched.

ART. 12. The army and its officers will accord, as far as circumstances permit, to the war correspondent suitable treatment and facilities, and, when in the field and in case of necessity, give him food, etc., or, at his request, give him transportation in vessels or vehicles.

ART. 13. In case the war correspondent is guilty of violation of the criminal law, military criminal law, law for the preservation of military secrets, etc., he may be adjudged and punished by the court-martial according to the military penal code.

ART. 14. Article 6 to 13 are applicable to interpreters and servants. (Daily Consular Reports, 1904, No. 1912, p. 2.)

Naval regulations.—The regulations particularly applying to naval war correspondents are:

REGULATIONS GOVERNING NAVAL WAR CORRESPONDENTS.

ARTICLE 1. A newspaper war correspondent desirous to accompany the navy shall make application to the naval staff, imperial headquarters, for permission.

ART. 2. A newspaper war correspondent shall obey all orders of the commanding officer of the fleet which he accompanies.

ART. 3. No communications concerning war shall be sent until after they have been examined by officers nominated for the purpose by the commanding officer of the fleet which he accompanies.

ART. 4. The commanding officer of the fleet may cancel the permission granted to a newspaper war correspondent.

ART. 5 Necessary regulations concerning the treatment of a newspaper war correspondent shall be fixed by the commanding officer of the fleet.

ART. 6. A newspaper war correspondent shall wear European dress and put on a low round-shaped cap, with a visor, and attach on his left arm a strip of white woolen cloth 1 sun (1.193 inches) wide, with the characters * * * (paper correspondent) on it.

ART. 7. A newspaper correspondent shall always carry his permit, mentioned in article 1, with him, and shall show it when asked by army or navy authorities. (Daily Consular Reports, 1904, No. 1912, p. 4.)

Effect of Japanese rules.—The effective control of the news relating to military movements during the Russo-Japanese war by the Japanese authorities fully justifies the rules enunciated by Japan. It is doubtless true that some of the correspondents have found it hard not to be upon the field of operations, but war is not undertaken for the sake of gratifying the curiosity of the public which reads the accounts of battles and military movements. Provided the correspondents have had fair treatment, there is no reason for complaint. The state must determine the general policy in regard to war correspondents, and the commanding officer in a given region must determine the particular application of this policy.

Russian regulations.—The following, according to the

Agence télégraphique russe, are the regulations for the conduct of foreign correspondents allowed within the field of operations:

Les étrangers doivent produire une recommandation de leur gouvernement auprès du ministère russe des affaires étrangères. Chaque correspondant doit s'engager, par écrit, à ne propager aucune nouvelle contenant des critiques, des dispositions ou des personnes, à représenter les faits conformément à la vérité et à supprimer les nouvelles qui ne peuvent se contrôler. La violation de ces dispositions, les indiscrétions, le manque de tact entraînent des observations, et, suivant les cas, l'éloignement du théâtre de la guerre. Pour tous les correspondants sans exception, l'entrée de l'amirauté, les docks et autres installations de la marine, ainsi que l'emploi de vapeurs sur les rades de Port Arthur et de Vladivostock, sont interdits. Les correspondants doivent s'engager à ne pas demander d'exceptions à ces dispositions. A leur arrivée sur le théâtre des opérations, ils doivent se rendre au quartier général et prouver leur identité par une photographie; l'état-major général les dirige alors sur l'état-major dont ils dépendent. Ils sont responsables de leurs domestiques. Comme insigne, ils doivent porter un brassard au bras gauche. Les dépêches chiffrées sont interdites. La censure des informations a lieu au quartier général, auprès de l'état-major de l'armée de Mandchourie, et à l'administration militaire de Kharbin, Niou-Chouang, Port Arthur et Vladivostock. (Quoted in Revue de Droit International, VI, p. 448.)

General scope of necessary regulations.—These rules should be such as—

1. To place the correspondents under the control of the naval commander.

2. To place the control of the news sent in the hands of commander.

3. To enable the commander to prohibit absolutely the sending of any information from the field of operations.

4. To place the agencies by which news are sent under control of the commander.

5. To enable the commander to inflict penalties for violations of any regulations he may make.

The commander should therefore control the correspondents themselves, determine the news to be sent, or prohibit communications entirely, control the means of sending by the establishment of proper regulations and penalties.

Conclusion.—From these conclusions it is manifest that correspondents must obtain a quasi-official standing,

and in order that control may be effective, that the agencies by which communication is had shall also be official to the extent of being under absolute military control.

Private, unresponsible persons or agencies would therefore be forbidden within the field of operations or the strategic area.

NOTE.—Since the above was printed, and too late for further reference, an article by Professor T. S. Woolsey supporting many of the positions herein taken has appeared in the Yale Law Journal for March, 1905, p. 247.

Situation VIII.

During the war between the United States and State X, two war vessels of State X are lying in the harbor of neutral State Y. These vessels go out of the harbor, beyond the jurisdiction of State Y, are damaged severely by war vessels of the United States, and return to the harbor of State Y, where they are abandoned and sink. The crews of these vessels are succored and received on board of neutral war vessels belonging to States A, B, and C, which are within the port. The United States commander claims these crews as prisoners of war.

(*a*) Is the claim justifiable?

(*b*) What disposition should be made of the crews if the commanders claim is not allowed?

Solution.

(*a*) The claim of the United States commander that the crews are prisoners of war is not justifiable. The crews had at no time been within the power of the United States commander.

(*b*) The crews should be interned or otherwise disposed so that they may not again take part in the war.

Notes on situation VIII.

(*a*) The United States war vessels damage two vessels of State X in battle on the high seas. These vessels seek refuge in the neutral port of State Y. There the vessels are abandoned and sink. The crews of the abandoned vessels are received upon neutral war vessels of other States than Y, which vessels chance to be in the port. The United States commander then claims the crews of the vessels as prisoners of war.

The first question which naturally arises is as to the status of the crews of the abandoned vessels of State X.

Prisoners of war.—Are they prisoners of war? The definition of the term prisoner of war is fairly uniform.

According to the Instructions for the Government of Armies of the United States in the Field (General Orders, No. 100), article 49—

A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field, or in the hospital, by individual surrender, or by capitulation.

All soldiers of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

The Brussels Convention of 1874, article 23, says:

Prisoners of war are lawful and disarmed enemies. They are in the power of the enemy's Government, but not of the individuals or of the corps who made them prisoners.

They should be treated with humanity.

Every act of insubordination authorizes the necessary measures of severity to be taken with regard to them.

All their personal effects, except their arms, are considered to be their own property.

According to the Oxford Manual of the Laws of War on Land, 1880:

ART. 21. Persons forming part of the armed forces of belligerents, on falling into the power of the enemy, must be treated as prisoners of war, conformably to article 61, and those following it.

This rule applies to messengers openly carrying official dispatches, and to civil aëronauts employed to observe the enemy or to keep up communication between different parts of the army or territory.

The Hague Convention, 1899, provides that—

ART. 3. The armed forces of the belligerent parties may consist of combatants and noncombatants. In case of capture by the enemy both have a right to be treated as prisoners of war.

Reasons why crews are not prisoners of war.—It will be seen from the Situation under discussion that the provisions requisite for the making of the crews prisoners of war had not been met in the case of the crews of the vessels of State X.

The single ground of failure to capture therefore would be sufficient to vitiate the claim of the commander.

There are various other reasons why the claim of the commander is not correct. (1) The enemy's ships must come within the power of the United States commander before they can be made prisoners of war. In this Situation while the enemy's ships are damaged they had not come under the power of the United States commander, and the crews had not, therefore, been made prisoners of war. At no time had the commander had the power to say what should be the disposition of the crews. Before the crews had deserted the vessels they had been under their own flag, and this was still the case after they had left the vessel, provided they had left in their own boats.

(2) On passing within the limits of neutral State Y, the field of belligerent action was passed. The only relations which the vessels of State X could maintain in the port would be peaceful relations. Hence the commander could not in port take prisoners of war without violating the neutrality of State Y.

(3) On going on board the war vessels of States A, B, and C, the crews of the vessels of State X passed within the jurisdiction of those States, and neither neutral State Y nor the United States could presume to exercise jurisdiction over those vessels because of their reception.

Neutral State Y would not interfere, because the crews of the vessels of State X were apparently under their own flag until they had passed under the flags of A, B, and C. Even if the crews had been compelled to enter the water without boats, and had been obliged to swim to the vessels of A, B, and C, though it might be held technically that while in the water and not under the organized control of their own officers the crews were under the jurisdiction of State Y because State Y was sovereign over the harbor waters, yet when they passed on board the war vessels of States A, B, and C, the crews passed out of the jurisdiction of State Y.

Public vessels in foreign ports.—Halleck, speaking of the general privileges of public vessels in foreign ports, says:

> Where there are no express prohibitions, the ports of one state are considered as open to the public armed and commissioned vessels of every other

nation with whom it is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under express permission, stipulated by treaty, or a permission implied from the absence of prohibition. This exemption, which is termed "extra-territoriality," extends not only to the belligerent ships of war, privateers, and the prizes of either, who seek a temporary refuge in neutral waters from the casualties of the sea and war, but also to prisoners of war on board any prize or public vessel of her captor. Such vessels, in the command of a public officer, possess in the ports of a neutral the rights of extra-territoriality, and are not subject to the local jurisdiction. But whatever may be the nature and extent of the exemption of the public or private vessels of one state, from the local jurisdiction in the ports of another, it is evident that this exemption, whether express or implied, can never be construed to justify acts of hostility committed by such vessel, her officers and crew, in violation of the law of nations against the security of the state in whose ports she is received, or to exclude the local tribunals and authorities from resorting to such measures of self-defense as the security of the state may require. Therefore a public vessel would not hesitate to give up to the local authorities a person accused of a serious crime who might come aboard her, and it is probable that she might even do so in the case of a person evading conscription. (Halleck's Internat. Law, vol. 1, p. 215.)

As neutral State Y would not presume to exercise jurisdiction over the war vessels of States A, B, and C, under the circumstances, much less could the commander of a United States war vessel in a neutral port exercise any authority or even claim as prisoners the crews of the vessels of State X, which had never been in his power. This case also differs from a case in which the shipwrecked or wounded are picked up upon the scene of a naval engagement. These crews in the harbor of State Y are removed from the exercise of authority on the part of the United States commander: (1) by the fact that the succor was afforded in a neutral port, and (2) by the fact that the succor was afforded upon neutral vessels of other states temporarily within the neutral port of Y.

Conclusion.—The claim of the United States commander that the rescued crews should be delivered to him as prisoners of war could not be sustained.

(*b*) There next arises the question of the disposition of these crews which have gone on board the war vessels of States A, B, and C.

Captain Mahan's position.—Captain Mahan, in a paper before the peace conference at The Hague, on June 20,

1899, argued that some definite provisions should be made for crews shipwrecked in battle. He said:

* * * On a field of naval battle the ships are constantly in movement; not merely the movement of a land battle, but a movement of progress, of translation from place to place more or less rapid. The scene is here one moment; a half hour later it may be five miles distant. In such a battle it happens that a ship sinks; her crew become *naufragés;* the place of action shifts; it is no longer where these men are struggling for life; the light cruisers of their own side come to help, but they are not enough; the hospital ships with the neutral flag come to help; neutral ships other than hospital also arrive; a certain number of *combattants naufragés* are saved on board neutral ships. To which belligerent do these men belong? It may happen that the neutral vessel, hospital or otherwise, has been with the fleet opposed to the sunken ship. After fulfilling her work of mercy she naturally returns to that fleet. The *combattants naufragés* fall into the power of the enemy, although it is quite probable that the fleet to which they belong may have had the advantage.

I maintain that unless some provision is made to meet this difficulty much recrimination will arise. A few private seamen, more or less, a few sub-officers, may not matter, but it is possible that a distinguished general officer, or valuable officers of the lower grade may be affected. This will tend to bring into discredit the whole system for hospital ships; but further, while hospital ships, being regularly commissioned by their own government may be supposed to act with perfect impartiality, such presupposition is not permissible in the case of vessels named in Article 6. Unless the status of *combattants naufragés* saved by them is defined, the grossest irregularities may be expected—the notoriety of which will fully repay the class of men who would perpetrate them.

As many cases may arise, all of which it is impossible to meet specifically, I propose the following additional articles, based upon the single general principle that *combattants naufragés,* being *ipso facto* combatants *hors de combat,* are incapable of serving again during the war, unless recaptured or until duly exchanged.

Captain Mahan embodied his ideas in the following articles, which, however, were not adopted:

1. In the case of neutral vessels of any kind, hospital ships or others, being on the scene of a naval engagement, which may, as an act of humanity, save men in peril of drowning, from the results of the engagement, such neutral vessels shall not be considered as having violated their neutrality by that fact alone. They will, however, in so doing act at their own risk and peril.

2. Men thus rescued shall not be considered under the cover of the neutral flag, in case a demand for their surrender is made by a ship of war of either belligerent. They are open thus to capture or to recapture. If such demand is made, the men so rescued must be given up, and shall then have the same status as though they had not been under a neutral flag.

3. In case no such demand is made by a belligerent ship, the men so rescued, having been delivered from the consequences of the fight by neutral interposition, are to be considered *hors de combat*, not to serve for the rest of the war unless duly exchanged. The Contracting Governments engage to prevent, as far as possible, such persons from serving until discharged. (Holls. Peace Conference at The Hague, p. 504.)

Captain Mahan's first article is very general. It covers "neutral vessels of any kind, hospital or others, being on the scene of a naval engagement, which may, as an act of humanity, save men in peril of drowning from the results of the engagement." In the second article he maintains that "men thus rescued shall not be considered under the cover of the neutral flag, in case a demand for their surrender is made by a ship of war of either belligerent."

These provisions as he mentions would particularly apply to cases involving circumstances similar to those under which the yacht *Deerhound* saved men of the *Alabama*, of which Mr. Seward said to Mr. Adams in a letter of July 15, 1864:

I freely admit that it is no part of a neutral's duty to assist in making captures for a belligerent, but I maintain it to be equally clear that, so far from being neutrality, it is direct hostility for a stranger to intervene and rescue men who had been cast into the ocean in battle, and then carry them away from under the conqueror's guns.

The case under consideration in this situation, however, does not contemplate rescue by a private ship as in the case of the *Deerhound*, but by a ship of war not upon the scene of hostilities, but in a neutral port. The crews are received on board a neutral war vessel, and a war vessel from its very nature can not be subjected to the provisions of the above articles.

Lawrence's opinion.—Lawrence, in his "War and Neutrality in the Far East," page 71, which appears as this is written, says:

The Chemulpo incident shows, among other things, that provision will have to be made in future for assistance by neutral ships of war, as well as by neutral hospital ships and ordinary neutral vessels. The nature of such provision is still open to controversy. We may hope to see the rejection of Captain Mahan's idea that neutral rescuers should be bound to give up their unhurt refugees to the first belligerent war ship which demands

them. Another project is that the neutral vessel which has gathered them up should report itself immediately to the belligerent commander controlling the scene of operations and take its orders from him, which would mean in most cases the surrender of the refugees as prisoners of war. This latter plan might sometimes be found difficult in practice. There have been cases when neither party controlled the scene after the action was over. The indecisive conflict between Sir Robert Calder and Villeneuve on July 22, 1805, is a case in point. Another instance may be taken from the battle of the Yalu, fought on September 17, 1894, at the close of which both the Japanese and the Chinese fleets left the waters in which they had contended. But quite apart from the fact that sometimes there may be no commander in control on the spot where the battle was fought, the principle underlying the proposals we have described seems inadmissible. It involves the deneutralization of humanity. If the rescued men are surrendered to their own side, they will again become combatants; if they are surrendered to the other side, they will be made prisoners of war. To assist in bringing about either of these consummations is surely inconsistent with neutrality. There remain the alternatives of "internment"—that is to say, keeping them in honorable detention under neutral guardianship for the rest of the war—or handing them over to their own friends in exchange for a solemn promise that they shall not serve again while hostilities continue. * * *

We interpret the obligations of neutrality and humanity more strictly than our fathers, but we need an international agreement to give symmetry and stability to our views. When it comes to be negotiated the precedent of Chemulpo will undoubtedly make for a very wide right of rescue on the part of neutral vessels, both public and private. But we may hope it will not be pressed in favor of anything approaching a right of interference in the struggle. It is one thing to save the life of a man struggling in the water, quite another to help him in keeping himself and his ship out of the hands of the victor.

Hague Conference Provisions.—Article VI of the "Convention Between the United States of America and Certain Powers for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864" (Hague Convention), ratified by the United States in 1900, provides that—

"Neutral merchantmen, yachts, or vessels having or taking on board sick, wounded, or shipwrecked of the belligerents can not be captured for so doing, but they are liable to capture for any violation of neutrality they may have committed."

Article LVII of the "Convention Between the United States of America and Certain Powers, With Respect to the Laws and Customs of War on Land" (Hague Conven-

tion), ratified by the United States in 1902, provides for the internment of the belligerent troops as follows:

Article LVII. A neutral state which receives in its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theater of war.

It can keep them in camps, and even confine them in fortresses or locations assigned for this purpose.

It shall decide whether officers may be left at liberty on giving their parole that they will not leave the neutral territory without authorization.

Article LVIII. Failing a special Convention, the neutral State shall supply the interned with the food, clothing, and relief required by humanity.

At the conclusion of peace, the expenses caused by the internment shall be made good.

Article LIX. A neutral State may authorize the passage through its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither combatants nor war material. In such case, the neutral State is bound to adopt such measures of safety and control as may be necessary for the purpose.

Wounded and sick brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral State, so as to insure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

Article LX. The Geneva Convention applies to sick and wounded interned in neutral territory.

If the crews of the abandoned war vessels of State X had gone to the shore of State Y as a portion of the military force of State X they would have been interned during the remainder of the war, according to the provisions of the Hague Convention, to which most of the States of the world are parties; or, even if not a party to the convention, State Y would intern them, in accord with the general international practice.

Effect of going on board public vessels.—In going on board of the war vessels of States A, B, and C, the crews of the vessels of State X practically enter the jurisdiction of States A, B, and C. Upon these war vessels of States A, B, and C no other State would claim any jurisdiction unless the peace of the port or the safety of the State was threatened, and even then action would ordinarily extend only to expelling the vessel from the port. Hence neither Y nor the United States would interfere.

As the crews of the abandoned vessels have, by entering the war vessels of States, A, B, and C, entered within the jurisdiction of those States, it may be presumed that they will observe their international obligations. It would not be incumbent upon the commander of the United States war vessel to inform the other commanders as to their obligations or to make claims. He might with propriety confer with them in regard to the disposition of the crews in question and indicate the line of conduct that he thought to be proper.

Chino-Japanese war of 1894–95.—During the Chino-Japanese war of 1894–95, certain neutral war ships rescued Chinese soldiers in Korean waters. Of these acts Takahashi says:

> As already mentioned, the French war ship *Lion* brought 45 Chinese soldiers to Chemulpo, and a German war ship sent back 120 Chinese soldiers from the islands in the Korean waters to Tientsin. The action of the French man-of-war was very humane in rescuing the Chinese, who were clinging to the masts of the sunken ship, but the act of the German vessel was not admissible from a legal point of view. The Chinese who were on the islands in the Korean waters were not in danger of their lives; on the other hand, it was said that they were displaying their usual lawlessness in plundering the villages of the island. They belonged to the crack regiment of the Chinese army, and it might be expected that they would serve again as soldiers. To send back these soldiers to China was nothing but giving assistance to one of the belligerents. By the law of nations, any belligerent can release prisoners on exacting an oath that they will not take arms again. But there is no precedent for a neutral restoring soldiers to one belligerent without taking the trouble to exact such an oath from them. (International Law during the Chino-Japanese war, p. 51.)

Takahashi admits that the soldiers might have been paroled, but denies the right of a neutral war vessel to restore them.

Chemulpo affair, 1904.—The case of the rescue of the officers and crews of the Russian ships *Variag* and *Korietz* in the harbor of Chemulpo, in the Russo-Japanese war affords a valuable precedent. The accounts of the circumstances vary somewhat (Lawrence 67, War and Neutrality in the Far East), but the following seems to be the course of events:

Japan severed her diplomatic relations with Russia on February 6, 1904.

On February 8th Admiral Uriu, of the Japanese navy, demanded of the senior Russian naval officer that he leave with the forces under his command the harbor of Chemulpo before noon of the 9th of February. In case of failure to comply with the demand, Admiral Uriu threatened attack upon the Russians. Admiral Uriu cautioned neutral vessels to keep clear of the field of possible action.

Earlier in the day the Russian gunboat, *Korietz*, had started for Port Arthur from Chemulpo, but seeing the Japanese vessels approaching, had returned to Chemulpo. It appears that by midnight of February 8th the Japanese forces, which had been landed, were in effective possession of Chemulpo. Early in the morning of the 9th the Japanese war vessels steamed out beyond the harbor. Before noon the Russian vessels, *Variag* and *Korietz*, started out. Before 1 o'clock these vessels, after a brief engagement, returned to the harbor of Chemulpo. The *Variag* was abandoned and sank during the afternoon. Boats from neutral war vessels in port received the personnel of the *Variag* and put them on board the British war vessel *Talbot* and the Italian war vessel *Elba*. The crew from the Russian war vessel *Korietz*, which seems not to have been injured in the engagement, later left that vessel in their own boats and went on board the French war vessel *Pascal*. Shortly afterwards, the *Korietz* blew up. The crew of a merchant vessel under the Russian flag, after setting fire to their vessel, also sought refuge in the *Pascal*.

While it has been claimed that the Japanese admiral demanded the Russian refugees as prisoners of war, the following is, upon good authority, asserted to be the fact:

The admiral in command of the Imperial Japanese fleet at Chemulpo did not make any demand for surrender to him of the Russian officers and men rescued from the sunken ships *Variag* and *Korietz*.

The survivors of the above-mentioned ships were temporarily taken on board the French man-of-war *Pascal*, British man-of-war *Talbot*, and Italian man-of-war *Elba*, but the representatives of France, Great Britain, and Italy at Seoul, having asked the views of the Japanese representative there in regard to the mode of sending back the said Russians, the Imperial Government instructed their representative to consent to the proposition on the following conditions:

(1) That the survivors of the Russian ships would be sent to Shanghai.

(2) That the Russian Government would give assurance that the said survivors would not be allowed to go to any place north of Shanghai.

The French representative addressed an official note to the Japanese representative, transmitting therewith a list of the names of the Russian survivors, signed by the captain of the *Pascal*, and giving assurance that the captain of the said vessel would not hand over the Russians to the authorities of other countries unless he obtained a guarantee from the said authorities to the effect that they would never be allowed to again take part in any act of hostilities. Thereupon the *Pascal* was permitted to sail for Shanghai with 8 officers and 39 petty officers and men from the *Variag* and 9 officers and 160 petty officers and men from the *Korietz* on board.

The British representative also addressed an official note, transmitting therewith a list of the names of the Russian survivors, signed by the captain of the *Talbot*, declaring that until the cessation of hostilities they would be detained within the British dominions. Thereupon the British ship *Amphitrite* was permitted to sail for Hongkong with the chief executive officer and other officers and men from the *Variag* on board, altogether numbering 275.

The Italian representative addressed an official note to the Japanese representative, transmitting therewith a list of the Russian survivors, stating that they would be taken to Shanghai and there instructions from the Italian Government as to the disposition of these men would be asked. Thereupon the Italian man-of-war *Elba* was permitted to leave for Shanghai with 7 officers and 174 petty officers and men from the *Variag*.

This recent example is in accord with the general principles governing in analogous cases.

Kleen's opinion.—Kleen gives a conclusion also which would support the action of the neutral war vessels. He says:

Particulièrement difficle est la question de savoir comment traiter des fuyards trouvés par des navires neutres sur mer (sur des îles, des débris, etc.). Une distinction essentielle semble devoir être faite selon qu'il y a, ou non, danger de mort. Dans le premier cas, et quand même les fuyards ne seraient ni blessés ni malades, ils se trouvent dans une situation analogue à de tels, plutôt qu'à celle de simples fuyards sur les territoires et dans les ports, puisqu'ils sont entre la vie et la mort et exposés à la perte à moins d'être secourus. A défaut de stipulation positive, il semble donc juste de les traiter d'apres les dispositions de la Convention de La Haye du 29 juillet 1899 (art. 6, 8 et 10), assurant la protection des naivres transportants, et des naufragés, blessés et malades, à condition de garanties contre leur rentrée dans la même guerre comme combattants. Si au contraire les fuyards recontrés sur mer sont hors de danger de mort, la question de savoir *si* l'humanité exige de donner suite à leurs réclamations de secours, peut dépendre du degré de détresse où ils se trouvent. S'ils sont ramassés par un naivre de guerre neutre ou en haute mer, ils sont placés dans la même situation juridique que des fuyards entrés sur un terri-

toire neutre, sujets à l'internement. Que si celui-ci était impossible à cause de l'éloignement de l'État du naivre, ils peuvent être remis à l'État convenable le plus proche avec des garanties contre leur rentrée au service belligérant. Si c'est dans des eaux territoriales et par un naivre neutre marchand qu'ils sont reçus, ce naivre doit les remettre à l'État territorial, à moins que cela n'implique un service de transport interdit pour le compte d'un belligérant, et cet État agira comme envers des fuyards entrés sur son territoire. (Kleen. La Neutralite. Vol. II, p. 32.)

Conclusions.—As these crews enter upon the vessels of States A, B, and C, those states become officially responsible for their treatment. The practice is such that had they gone ashore in the harbor by putting themselves under the jurisdiction of State Y, they would have been interned. By going on board of the war vessels of States A, B, and C, they put themselves under the jurisdiction of those states and should be interned or otherwise disposed in such manner that they would not again participate in hostilities during the remainder of the war.

It may be said, therefore, that—

(*a*) The claim of the United States commander was not justifiable, as he had not captured the vessels of State X and could exercise no jurisdiction within the port of neutral State X or upon the neutral war vessels belonging to States A, B, and C.

(*b*) The proper adjustment of the case under consideration would be the internment of the rescued seamen or other disposition by which they should not again take part in the war.

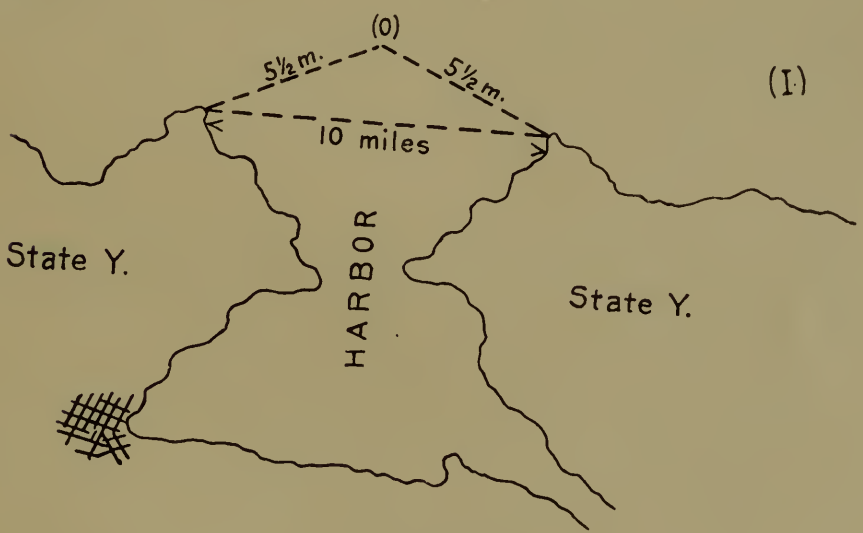
It may be noted that this case particularly shows the need for further agreement upon the rules of maritime warfare.

Situation IX.

During the war between the United States and State X, a war vessel of the United States meets a war vessel of State X off the harbor of neutral State Y. When about to attack the war vessel of State X, a war vessel of State Y, near point (0), signals that it would be a violation of neutrality to engage in battle at that point. The point (0) is found to be $5\frac{1}{2}$ miles from the nearest land of State Y, as shown in the accompanying plan (I) below.

(*a*) What is the limit of territorial jurisdiction?

(*b*) What should the commander do in regard to the protest?



SOLUTION.

(*a*) The limit of territorial jurisdiction in the Situation under consideration would be generally admitted to be 3 nautical miles outside the "straight line athwart the bay as close as possible to the entrance at the first point at which the entrance to the bay exceeds 10 miles of 60° latitude," as the Netherlands proclamation states.

(*b*) The commander of the United States war vessel should heed the protest of neutral State Y and should not attack the vessel of State X until it passes outside of neutral jurisdiction, and must use reasonable care that no act of hostility takes place which will endanger neutral safety.

NOTES ON SITUATION IX.

Maritime jurisdiction.—The limit of maritime territorial jurisdiction has been the subject of much difference of opinion. The rule of Bynkershoek has formed the basis of the opinion since it was set forth in "De Dominio Maris" in 1702. He maintained "potestatem terræ finiri ubi finitur armorum vis," or that the territorial jurisdistion was bounded by the range of arms. In those days this range seems to have been about a marine league. Hence the three-mile limit became common. It was acknowledged in many treaties. It was legalized in some states, as by the Territorial Waters Jurisdiction Act of Great Britain in 1878, and the convention of 1888 in regard to the Suez Canal, and Article III, 5, of the Hay-Pauncefote treaty of 1901 also adopts the three-mile limit of maritime jurisdiction for the Panama Canal. The marine league was also adopted in fisheries treaty between the United States and Great Britain of October 20, 1818, Article I.

Three marine miles from the low-water mark may be considered as in practice the conventional extent of maritime jurisdiction. There are, however, many exceptions claimed and granted.

One of the most common claims, though not generally admitted, is that the rule enunciated by Bynkershoek should be followed, viz, that the maritime jurisdiction should be bounded by the range of arms and should accordingly be increased as the range of arms increases. For certain purposes, such as for attack and defense of the coast, it is maintained that this is in fact the real limit of effective jurisdiction at the present time.

For revenue purposes, for the protection of special industries, such as fishing, and for other reasons, various limits beyond the three-mile line have been claimed and acknowledged from time to time.

Kent's extreme claim.—Kent makes extreme claims for the United States. On page 112 of Abdy's edition of his Commentary on International Law, he says:

> All that can reasonably be asserted is that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his

safety and for some lawful end. A more extended dominion must rest entirely upon force and maritime supremacy. According to the current of modern authority the general territorial jurisdiction extends into the sea as far as a cannon shot will reach and no farther, and this is usually calculated to be a marine league (or three miles, the maxim in which this doctrine is embodied being "terræ finitur dominium ubi finitur armorum vis"), and the Congress of the United States have recognized this limitation by authorizing the district courts to take cognizance of all captures made within a marine league of the American shores. The Executive authority of that country, in 1793, considered the whole of Delaware Bay to be within its territorial jurisdiction, resting its claims upon those authorities which admit that gulfs, channels, and arms of the sea belong to the people with whose lands they are encompassed, and it was intimated that the law of nations would justify the United States in attaching to their coasts an extent into the sea beyond the reach of cannon shot.

Considering the great extent of the line of the American coasts, their writers contend that they have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; nor would it be unreasonable, as they say, to assume, for domestic purposes connected with their safety and welfare, the control of the waters on their coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that their Government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of their coast, far beyond the reach of cannon shot, as cruising ground for belligerent purposes. In 1793 the Government of the United States thought they were entitled, in reason, to as broad a margin of protected navigation as any nation whatever, though at that time they did not positively insist upon more than the distance of a marine league from the seashores; and in 1806 they thought it would not be unreasonable, considering the extent of the United States, the shoalness of their coast, and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare for the space between that limit and the American shore.

It ought, at least, to be insisted, they urged, that the extent of the neutral immunity should correspond with the claims maintained by Great Britain around her own territory, and that no belligerent right should be exercised within "the chambers formed by headlands, or anywhere at sea within the distance of four leagues, or from a right line from one headland to another." In the case of the *Little Belt*, which was cruising many miles from shore between Cape Henry and Cape Hatteras, the Government of the United States laid stress on the circumstance that she was "hovering on our coasts," and it was contended on their part that they had a right to know the national character of armed ships in such a situation, and that it was a right immediately connected with their tranquillity and peace. It was further observed that all nations exercise the right, and none with

more rigor or at a greater distance from the coast, than Great Britain, and none on more justifiable grounds than the United States. There can be but little doubt that the more the United States advance in commerce and naval strength the more will their Government be disposed to feel and acknowledge the justice and policy of the British claim to supremacy over the narrow seas adjacent to the British isles, because they will stand in need of similar accommodation and means of security.

This position assumed by Kent presents the case of claims for jurisdiction beyond the three-mile limit more broadly than the Government itself was inclined to presume to make claims. No such extreme position would now be taken even in the claims for fishing rights.

Russian provision.—Article 21 of the Russian Prize Law provides: "The right of making prizes is recognized only in the open seas. As for the open sea, it consists of waters which are not under fire of neutral batteries, or three sea miles from the neutral shores." (U. S. For. Rel., 1886, p. 957.)

French position in 1864.—In 1864, at the time of the prospective battle between the *Kearsarge* and the *Alabama*, the following dispatches were sent, showing something of the opinion of the time:

Mr. Dayton to Mr. Seward.

PARIS, *June 17, 1864.*

SIR: You will, doubtless, have received, before this, notice of the arrival of the *Alabama* in the port of Cherbourg and my protest to this Government against the extension of any accommodations to this vessel. M. Drouyn de l'Huys yesterday informed me that they had made up their minds to this course, and he gave me a copy of the written directions given by the minister of marine to the vice-admiral, maritime prefect at Cherbourg, a translation of which accompanies this dispatch. But he, at the same time, informed me that the United States ship of war, the *Kearsarge*, had appeared off the port of Cherbourg and there was danger of an immediate fight between those vessels; that the *Alabama* professes its entire readiness to meet the *Kearsarge*, and he believed that each would attack the other as soon as they were three miles off the coast; that a sea fight would thus be got up in the face of France, and at a distance from their coast within reach of the guns used on shipboard in these days; that the distance to which the neutral right of an adjoining government extended itself from the coast was unsettled, and that the reason of the old rules, which assumed that three miles was the outermost reach of a cannon shot, no longer existed, and that, in a word, a fight on or about such a distance from their coast *would be offensive to the dignity of France* and they would *not*

permit it. I told him that no other rule than the three-mile rule was known or recognized as a principle of international law, but if a fight were to take place, and we would lose nothing and risk nothing by its being farther off, I had, of course, no objection. I had no wish to wound the susceptibilities of France by getting up a fight within a distance which made the cannon shot liable to fall on her coast. I asked him if he would put his views and wishes on this question in writing, and he promised me to do so. I wrote to Captain Winslow this morning, and herewith inclose you a copy of my letter. I have carefully avoided in this communication anything which would tend to make the *Kearsarge* risk anything by yielding what seemed to me an admitted right.

To deliver this letter, and understand some matters in respect to the alleged sale of the clipper ships at Bordeaux, I have sent my son to Cherbourg.

I am, sir, your obedient servant, WM. L. DAYTON.

Hon. WILLIAM H. SEWARD, etc.

Mr. Dayton to Captain Winslow.

SIR: This will be delivered to you by my son and assistant secretary of legation. I have had a conversation this afternoon with M. Drouyn de l'Huys, minister of foreign affairs. He says they have given the *Alabama* notice that she must leave Cherbourg, but in the meantime you have come in and are watching the *Alabama*, and that this vessel is anxious to meet you, and he supposes you will attack her as soon as she gets three miles off the coast; that this will produce a fight which will be at best a fight in waters which may or may not be French waters, as accident may determine; that it *would be offensive to the dignity of France* to have a fight under such circumstances and France will *not permit it;* that the *Alabama* shall not attack you, nor you her, within the three miles or on or about that distance off. Under such circumstances I do not suppose that they would have, on principles of international law, the least right to interfere with you if three miles off the coast, but if you lose nothing by fighting six or seven miles off the coast instead of three, you had best do so. You know better than I (who have little or no knowledge of the strength of the two vessels) whether the pretense of the *Alabama* of a readiness to meet you is more than a pretense, and I do not wish you to sacrifice any advantage if you have it. I suggest only that you avoid all unnecessary trouble with France, but if the *Alabama* can be taken without violating any rules of international law, and may be lost if such a principle is yielded, you know what the Government would expect of you. You will, of course, yield no real advantage to which you are entitled, while you are careful to so act as to make uselessly no unnecessary complications with the Government. I ought to add that Mr. Seward's dispatch, dated May 20, 1864, was in the following words: "The *Niagara* will proceed with as much dispatch as possible to cruise in European waters, and that the *Dictator,* so soon as she shall be ready for sea (which is expected to be quite soon), will follow

her, unless in the meantime advices from yourself and Mr. Adams shall be deemed to furnish reasons for a change of purpose in that respect." That you may understand exactly the condition of things in regard to the *Alabama*, I send you herewith a copy of a communication from the minister of marine of the naval prefect at Cherbourg, furnished me by the minister of foreign affairs.

Respectfully, your obedient servant,

WM. L. DAYTON.

Captain WINSLOW,
United States Ship Kearsarge.
(Diplomatic Correspondence, 1864, Pt. 3, p. 104.)

A subsequent report affirms that "the *Alabama* sunk five miles from shore." Captain Semmes says that the *Kearsarge* was about nine miles off shore as he left the harbor, and that the *Kearsarge* was within about 400 yards when the *Alabama* was on the point of sinking. This testimony seems to show that the protest of France was heeded, and that the fighting took place at a safe distance from shore. The testimony of eyewitnesses from the shore is also to the same effect. A French man-of-war accompanied the *Alabama* "to the distance of at least three miles to see, doubtless, that the three-mile rule was respected."

Questions raised by United States.—Later in 1864 a discussion of the question of belligerent action in the neighborhood of neutral territory was carried on between the United States and Great Britain, but no agreement was reached among the maritime powers.

Mr. Seward to Mr. Burnley.

DEPARTMENT OF STATE,
Washington, September 16, 1864.

SIR: On the 30th day of May last Commander Trenchard, of the United States steamer *Rhode Island*, while chasing the insurgent vessel the *Margaret and Jessie* in the open sea off the coast of Eluthera, in the Bahamas, fired at her at least one cannon shot, which is alleged to have reached the neutral coast. Her Britannic Majesty's Government thereupon complained to this Government that the *Rhode Island* had come and was within the distance of a marine league, or three miles from the shore, when the cannon ball was fired. On investigating the complaint it did not satisfactorily appear that a cannon ball was fired by the chaser within the distance of three miles from the land, but, on the other hand, it was established that a Parrott gun, which was discharged, had a range of five miles, and that a ball from it might have reached the neutral shore, although fired outside of the line of maritime jurisdiction.

Upon this state of facts Her Majesty's Government have, through you, expressed a hope that the United States will concur with the British Government in opinion that vessels should not fire toward a neutral shore at a less distance than that which would insure shot not falling into neutral waters, or in a neutral territory. To this suggestion I at once replied, by order of the President, that the subject would be brought to the attention of other maritime powers, in order that if any change of the existing construction of the maritime law should be made it should first receive the assent of all the great maritime states.

There is reason to apprehend that the subject, although now abstractly presented, may soon become a practical question. Spain claims a maritime jurisdiction of six miles around the island of Cuba. In pressing this claim upon the consideration of the United States Spain has used the argument that the modern improvement in gunnery renders the ancient limit of a marine league inadequate to the security of neutral states.

When it is understood at Paris that an engagement was likely to come off before Cherbourg between the United States ship of war *Kearsarge* and the pirate *Alabama*, the French Government remonstrated with both parties against firing within the actual reach of the shore by cannon balls fired from their vessels, on the ground that the effect of a collision near the coast would be painful to France.

For these reasons I think that the subject may now be profitably discussed; but there are some preliminary considerations which it is deemed important to submit to Her Majesty's Government: First, that the United States, being a belligerent now when the other maritime states are at peace, are entitled to all the advantages of the existing construction of maritime law, and can not, without serious inconvenience, forego them; secondly, that the United States, adhering in war no less than when they were in the enjoyment of peace to their traditional liberality toward neutral rights, are not unwilling to come to an understanding upon the novel question which has thus been raised "in consequence of the improvement in gunnery;" but, thirdly, it is manifestly proper and important that any such new construction of the maritime law as Great Britain suggests should be reduced to the form of a precise proposition, and then that it should receive in some manner, by treaty or otherwise, reciprocal and obligatory acknowledgments from the principal maritime powers.

Upon a careful examination of the note you have addressed to me the suggestions of Her Majesty's Government seem to me to be expressed in too general terms to be made the basis of a discussion. Suppose, by way of illustration, that the utmost range of cannon now is five miles; are Her Majesty's Government understood to propose that the marine boundary of neutral jurisdiction, which is now three miles from the coast, should be extended two miles beyond the present limit? Again, if cannon shot are to be fired so as to fall not only not upon neutral land, but also not upon neutral waters, then supposing the range of the cannon shot to be five miles, are Her Majesty's Government to be understood as proposing that cannon shot shall not be fired within a distance of eight miles from the neutral territory? Finally, shall measure-distances be excluded altogether from the statement,

and the proposition to be agreed upon be left to extend with the increased range of gunnery; or shall there be a pronounced limit of jurisdiction, whether five miles, eight miles, or any other measured limit?

I have to request that you will submit these suggestions to your Government, to the end that they may define, with necessary precision, the amendment of maritime law which they think important, and upon which they are willing to agree with the other maritime powers.

I have the honor to be, with high consideration, sir, your most obedient servant,

WILLIAM H. SEWARD.

J. HUME BURNLEY, Esq., etc., etc.

(Diplomatic Correspondence of 1864, p. 704.)

Questions raised by Professor Moore.—In a communication from Professor Moore, considered by the Institute of International Law in 1894, he says:

The second clause of the article proposes to forbid belligerent acts within the range of cannon shot from the coast. Should you in this matter measure from the limits of territorial waters, or from the shore at low water mark? If the measurement should be made from the latter, it might not be sufficient for the purposes of the rule. As I understand the subject, a nation is bound to prevent unneutral acts within its jurisdiction, which covers territorial waters. If, therefore, belligerent acts which operate within the jurisdiction, though the parties committing them may be outside, are to be considered as a violation of the state's neutrality, should not the belligerent acts be required to take place at the designated distance from jurisdictional limits? (Annuaire d l'Institut de Droit International, XIII, p. 149.)

Position of Secretary Bayard.—In discussing the British fisheries question Mr. Bayard, then Secretary of State, writes to Mr. Manning, Secretary of the Treasury, on May 28, 1886, expressing the determination to maintain the three-mile limit as a restriction. He, however, says:

We do not, in asserting this claim, deny the free right of vessels of other nations to pass on peaceful errands through this zone, provided they do not, by loitering, produce uneasiness on the shore or raise a suspicion of smuggling. Nor do we hereby waive the right of the sovereign of the shore to require that armed vessels, whose projectiles, if used for practice or warfare, might strike the shore, should move beyond cannon range of the shore when engaged in artillery practice or in battle, as was insisted on by the French Government at the time of the fight between the *Kearsarge* and the *Alabama*, in 1864, off the harbor of Cherbourg. (Wharton, Internat. Law Digest, vol. 1, p. 108.)

This position of Secretary Bayard, taken at a time when the matter of limitation of the field of belligerent

activity was not under consideration, upholds the position taken by France more than twenty years earlier. It may further be maintained that a neutral state may as a police measure require that the action of belligerents shall not endanger her safety.

Other opinions.—Mr. Wharton summarizes some of the discussion between the United States and Great Britain and the decisions under their treaties as follows:

A construction of the terms "coasts, bays, creeks, or harbors" in the treaty of 1818 was given by the mixed commission under the convention of 1853 in the case of the United States fishing schooner *Washington*, which was seized while fishing in the Bay of Fundy, ten miles from shore, taken to Yarmouth, Nova Scotia, and adjudged forfeited, on the charge of violating the treaty of 1818 by fishing in waters in which the United States had, by that convention, renounced the right of its citizens to take fish. A claim of the owners of the *Washington* for compensation came before the commission above mentioned, and, the commissioners differing, the case was referred to Mr. Joshua Bates, the umpire, who, referring to the theory that "bays and coasts" were to be defined by "an imaginary line drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line, thus closing all the bays on the coast or shore and that great body of water called the Bay of Fundy," pronounced it a "new doctrine," and, repudiating the decision of the provincial court based thereon, awarded the owners of the vessel compensation for illegal condemnation.

The umpire also decided that as the Bay of Fundy is from 65 to 75 miles wide and from 130 to 140 miles long, with several "bays" on its coasts, and has one of its headlands in the United States, and must be traversed for a long distance by vessels bound to Passamaquoddy Bay, and contains one United States island, Little Menan, on the line between headlands, the Bay of Fundy could not be considered as an exclusively British bay. (See President's message communicating proceedings of commission to Senate; also Dana's Wheaton, 274, note 142.) The "headland" theory was again rejected by the umpire in the case of the schooner *Argus*, which was seized while fishing on Saint Ann's Bank, 28 miles from Cape Smoke, the nearest land, taken to Sidney, and sold, for violation of the treaty of 1818 by fishing within headlands. The owners were awarded full compensation. (Wharton, International Law Digest, vol. 3, p. 59.)

Davis states that:

The question of jurisdiction over many such partly included bodies of water, sometimes called closed seas, has already been decided. The Chesapeake and Delaware bays are recognized as parts of the territory of the United States; Hudson Bay and the Irish Sea as British territory; the Caspian Sea belongs to Russia; Lake Michigan to the United States. The Black Sea, before Russia obtained a foothold upon it, formed part of the

territories of the Ottoman Porte; it is now subject to the joint jurisdiction of Turkey and Russia. The Baltic is acknowledged to have the character of a closed sea (and to be subject to the control of the powers surrounding it) certainly to the extent of guaranteeing it against acts of belligerency when the powers within whose territory it lies are at peace. (Davis, Elements of International Law, p. 58.)

Headland doctrine.—By a treaty between Great Britain and France of August 2, 1839, the limit of jurisdiction was for bays to be measured from a line drawn directly athwart the bay at a point where the opening of the bay did not exceed ten miles. Belgium had earlier adopted this rule by a law of June 7, 1832. In a "Notice to the British fishermen fishing off the coasts of North Germany," issued in 1868, the following provision occurred:

NOTICE.

1. The exclusive fishery limits of North Germany are designated by the North German government as follows: that tract of the sea which extends to a distance of 3 sea miles from the extremest limit which the ebb leaves dry of the German North Sea coast of the German Islands or Flats lying before it, as well as those bays and incurvations of the coast which are 10 sea miles or less in breadth, reckoned from the extremest points of the land and the Flats, must be considered as under the territorial sovereignty of the North German Confederation. (Perels, Manuel de Droit Maritime International, 1884, p. 43.)

Institute of International Law, 1894.—The Institute of International Law in 1894 adopted twelve miles as the width of the mouth of inclosed bays and the line of marine jurisdiction would run parallel at a distance of three miles from the twelve-mile line.

ART. 3. Pour les baies, la mer territoriale, suit les sinuosités de la côte, sauf qu'elle est mesurée à partir d'une ligne droite tirée en travers de la baie dans la partie, la plus raprochee de l'ouverture ver la mer, où l'écart entre les deux côtes de la baie, est de douze milles marins de laguer, à moins qué un usage, continu et séculaire n'ait consacré une largeur plus grande. (Annuaire XIII, p. 329.)

Other opinions.—Rivier considers the limits of effective control and inclines to regard the ten-mile line as a reasonable one for the mouths of rivers and bays.

Conformément à ce qui vient d'être dit, les portions de mer, ou les mers qu'en raison de leur configuration on appelle golfes, ou baies, sont territoriales lorsqu'elles sont environnées des terres d'un seul État et que leur entrée est suffisamment étroite pour être commandée par les canons de la

côte. Mais du moment qu'il y a plusieurs États côtiers, le golfe est mer libre, quelle que soit la largeur de son entrée. Le golfe, même entouré par un seul État, est mer libre, si l'entrée est trop large pour être dominée de la côte. On admet assez généralement qu'il en est ainsi lorsque l'écartement des deux rives est de plus de dix milles marins.

A convention at The Hague of May 6, 1882, in its second article, made the following provision:

Pour les baies, le rayon de trois milles sera mesuré à partir d'une ligne droite, tirée en travers de la baie, dans la partie la plus rapprochée de l'entrée, au premier point où l'ouverture n'excédera pas dix milles. (Rivier, Principes de Droit des Gens, 1896, I, pp. 154, 155.)

The general drift of opinion has been toward the admission of a claim to jurisdiction over bays when the mouth is not more than ten miles in width and also to three miles beyond the line drawn from headland to headland. Hall says:

It seems to be generally thought that straits are subject to the same rule as the open sea; so that when they are more than six miles wide the space in the center which lies outside the limit of a marine league is free, and that when they are less than six miles wide they are wholly within the territory of the state or states to which their shores belong. This doctrine, however, is scarcely consistent with the view, which is also generally taken, that gulfs, of a greater or less size in the opinion of different writers, when running into the territory of a single state can be included within its territorial waters. Perhaps, also, it is not in harmony with the actual practice with respect to waters of the latter kind. France, perhaps, claims "baies fermees" and other inlets or recesses the entrance of which is not more than ten miles wide. Germany regards as territorial the waters within bays or incurvations of the coast which are less than ten sea miles in breadth, reckoned from the extremest points of the land, and doubtless includes all the water within three miles outward from the line joining such headlands. England would, no doubt, not attempt any longer to assert a right of property over the Queen's Chambers, which include the waters within lines drawn from headland to headland, as from Orfordness to the Foreland and from Beachy Head to Dunnose Point; but some writers seem to admit that they belong to her, and a recent decision of the Privy Council has affirmed her jurisdiction over the Bay of Conception in Newfoundland, which penetrates forty miles into the land and is fifteen miles in mean breadth. Authors also so little favorable to maritime property as Ortolan and De Cussy class the Zuyder Zee amongst appropriated waters. The United States probably regards as territorial the Chesapeake and Delaware bays, and other inlets of the same kind. Many claims to gulfs and bays still find their place in the books, but there is nothing to show what proportion of these are more than nominally alive. (Hall, International Law, 5th ed., p. 155.)

The Institute of International Law in 1894 adopted the rule that in case of war a coast state could, by declaration, extend the zone of maritime neutrality.

ARTICLE 4. En cas de guerre, l'Etat riverain neutre a le droit de fixer, par la déclaration de neutralité ou par notification spéciale, sa zone neutre au delà de six milles, jusqu' à portée du cannon des côtes. (Annuaire XIII, p. 329.)

In view of the increasing range of guns, the necessity of the protection of harbors, the liability of injury to commerce and to shore interests, it is not unreasonable to claim a wider jurisdiction, where bays are somewhat over six miles wide, than would be claimed under the strict three-mile limit. Precedents seem to favor such claims in time of peace. There is even more justification for the claims in time of war.

Bonfils says, "Il est généralment admis que les golfes appartiennent à l'Etat dont les terres environnent, lorsque leur largeur ne dépasse pas dix milles marins. (Droit International Public, 516.)

Netherlands proclamation, 1904.—A recent proclamation of neutrality in Russo-Japanese war of 1904 met no opposition.

ARTICLE 8. Under the territory of the kingdom is also included the sea-coast to within a distance of three nautical miles of 60° latitude at low water mark. In regard to bays, that distance of three nautical miles shall be measured from a straight line athwart the bay as close as possible to the entrance at the first point at which the entrance to the bay exceeds ten miles of 60° latitude. (Netherlands Proclamation of Neutrality, Russo-Japanese war, 1904.)

As the United States has claimed jurisdiction over the mouths of bays and gulfs much beyond that claimed in the Netherlands proclamation, it is probable that it would admit the claim of State Y as presented in this situation.

Conclusions.—(*a*) The limit of territorial jurisdiction in the situation under consideration would be generally admitted to be three nautical miles outside the "straight line athwart the bay as close as possible to the entrance at the first point, at which the entrance to the bay exceeds ten miles of 60° latitude," as the Netherlands proclamation states.

(*b*) The commander of the United States war vessel should heed the protest of neutral State Y, and should not attack the vessel of State X until it passes outside of neutral jurisdiction, and must further use reasonable care that no act of hostility takes place which will endanger neutral safety.

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